87-730 (1)
No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTINE MEYER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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87 PP

QUESTIONS PRESENTED

1. Whether a presumption of vindictiveness can attach to a prosecutor's decision to increase the charges against a defendant prior to trial.

2. Whether a district court may dismiss a charge that is untainted by any allegation of vindictiveness as the remedy for prosecutorial vindictiveness in connection with a separate charge.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America. Appellees in the court of appeals and respondents in this Court are Christine A. Meyer, Theresa Fitzgibbon, Norman C. Jimerson, Angela J. Keefe, Susan J. Blake, Jo Ellen Childers, Kitty Fives, Julie L. Sinai, Richard Spener, Lisa Tarver, Mindy Washington, Maria R. Conners, Jeanne Marie Walsh, Judith Hand, Robert G. Coleman, Margaret E. DeColigny, Wallie H. Mason, Edward R. Rauber, Mary S. Dailey, Virginia Senders, Joan E. Whitney, Judith Hearn, Teri K. Galvin, Cheryl L. Hughes, Margaret Arteago, Carol L. Bellin, Marguerite Toll, Renata E. Eustis, Martin G. Weiner, Dawn M. Cook, Marjorie N. Van Clief, Jacob Weinstein, Carol J. Chappell, Richard Deyo, Ann Marie Eisenberg, and Kevin Raymond Reilly.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-15a) is reported at 810 F.2d 1242. The opinions accompanying the vacatur of the order granting rehearing en banc and the denial of rehearing (App., *infra,* 16a-50a) are reported at 824 F.2d 1240. The bench ruling of the district court granting respondents' motion to dismiss the informations (App., *infra,* 51a-54a) is unreported. The opinion of the district court denying the government's motion for reconsideration (App., *infra,* 55a-57a) is reported at 664 F. Supp. 550.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 58a-59a) was entered on February 13, 1987. A petition for

rehearing was denied on July 31, 1987 (App., *infra*, 63a).[1] On September 22, 1987, the Chief Justice entered an order extending the time within which to file a petition for a writ of certiorari to and including October 29, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. On April 22, 1985, United States Park Service police officers issued citations to approximately 200 persons who were demonstrating outside the White House. Each citation alleged a violation of 36 C.F.R. 50.19 (1985), which makes it a misdemeanor to demonstrate on national park grounds without a permit. That offense carried a maximum penalty of six months' imprisonment and a $500 fine (36 C.F.R. 50.5(d) (1985)). Some of the demonstrators posted and forfeited $50 collateral in full satisfaction of the charge.[2] Others decided to contest their citations in court.

On the date of arraignment, the prosecutor filed two-count informations against most of the remaining demonstrators, including respondents. The informations charged each of the defendants with one count of demonstrating without a permit, in violation of 36 C.F.R.

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[1] The panel denied the government's petition for rehearing on April 30, 1987 (App., *infra*, 60a). On that date, however, the full court of appeals entered an order granting the government's suggestion for rehearing en banc (App., *infra*, 61a). By an order entered on July 31, 1987, the full court vacated its April 30, 1987, order and reinstated the judgment and panel opinion entered on February 13, 1987 (App., *infra*, 22a). On July 31, 1987, the panel entered an order again denying the government's petition for rehearing (App., *infra*, 63a).

[2] Pursuant to Local Rule 3-8(a)(16) (now Rule 505(d)) of the Rules of the United States District Court for the District of Columbia, the magistrates have prescribed $50 as the appropriate fine for disposing of the charge of demonstrating without a permit. That fine is paid by forfeiture of collateral, as permitted by Rule 4 of the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates, 18 U.S.C. App. at 675.

50.19, and one count of obstructing sidewalks adjacent to the White House, in violation of 36 C.F.R. 50.30 (1985). The second count, like the first, carried a maximum penalty of six months' imprisonment and a $500 fine (36 C.F.R. 50.5(a) (1985)). Most of the defendants then entered pleas of not guilty to both counts of the informations. A small number, however, pleaded no contest to a single charge of demonstrating without a permit. They were sentenced to brief terms of unsupervised probation. The remaining count of obstructing the sidewalk was dismissed against those defendants. The defendants who entered pleas of not guilty were ordered to return for trial on September 11, 1985.

2. On that date, respondents moved to dismiss the informations on the ground of prosecutorial "vindictiveness," *i.e.*, that the government added the second misdemeanor charge to punish respondents for choosing to stand trial, rather than forfeiting collateral. At the outset of the district court's hearing on the motion, the prosecutor moved to dismiss the charge of obstructing the sidewalks in order to avoid the need for a jury trial. The district court granted the motion (9/11/85 Tr. 3). Respondents, however, contended that they were entitled to a dismissal of both charges against them because of the alleged vindictiveness of the prosecutor in bringing the second charge after they had insisted on a trial (*id.* at 14-38).

Respondents claimed that they had no notice that the prosecutor would add a new charge if they refused to plead guilty and went to trial. Respondents also alleged that they had not been informed that they could forfeit the $50 collateral and terminate the case at any time (9/11/85 Tr. 15, 17). Finally, respondents asserted that the prosecutor added the second misdemeanor charge simply to "coerc[e] or pressur[e] the defendants to enter guilty pleas or to pay the $50 fine[,] with the threat of prosecution and a year of prison behind that should they choose to exer-

cise their right to trial" (*id.* at 16-17). In response, the prosecutor contended that, under *United States* v. *Goodwin*, 457 U.S. 368 (1982), a prosecutor's pretrial decision to increase the charges against a defendant is not presumptively "vindictive" (9/11/85 Tr. 19-20). The prosecutor explained that the government added the second misdemeanor charge after a representative of the United States Attorney's office first examined the case, which occurred only after respondents had been arrested on the initial misdemeanor charge and had decided to stand trial (*id.* at 21).[3] Lastly, the prosecutor stated that "the offer for individuals to forfeit the $50 collateral remains open to today up to the beginning of trial and has remained open throughout" (*id.* at 21).

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[3] The prosecutor engaged in the following colloquy with the district court (9/11/85 Tr. 20-21):

> MR. MC DANIEL [the prosecutor]: Your Honor, I would suggest because of the vast number of arrests and the amount of paper work that had to be processed—
>
> THE COURT: If what you say is true, then there would be different charges against different individuals arising out of the additional information.
>
> MR. MC DANIEL: Perhaps, your Honor.
>
> THE COURT: You knew everything except the details of what the officer would testify to and the confirmation of the alleged misconduct was known at the time that they were given the ticket.
>
> MR. MC DANIEL: The facts were known, your Honor.
>
> THE COURT: Certainly they were known.
>
> MR. MC DANIEL: The recognition of which legal theory the govenment wished to proceed on was a different matter. That is something that required a certain amount of contemplation and analysis by members of the United States Attorney's Office and that was motivated, I would suggest, solely by a balancing of the societal interests in controlling unruly demonstrations and the relative gravity of this particular offense given its effect upon the community.

The district court granted the motion to dismiss, ruling that the government's decision to add a second charge was vindictive because it was made without giving respondents any notice (App., *infra,* 51a-54a). As the district court put it, "to this Court it's a clear indication that in the exercise of your right to have a jury trial, the government upped the ante, as far as the government is concerned, with no notice, no consultation, with no opportunity for you to make an election" (*id.* at 54a). The district court reiterated that conclusion in a later order denying the government's motion for reconsideration (*id.* at 55a-57a).

3. The government appealed the district court's ruling, and the court of appeals affirmed (App., *infra,* 1a-15a). The court declined to decide whether the prosecutor who filed the second misdemeanor charge against respondents was actually motivated by vindictiveness (*id.* at 6a). Instead, the court concluded that a presumption of vindictiveness was justified, for several reasons (*id.* at 7a-14a).

First, the court found that "the most important" factor justifying a presumption of vindictiveness was that the government treated differently those demonstrators who chose to forfeit collateral and those who chose to stand trial, since only persons in the latter group were charged with two misdemeanors (App., *infra,* 8a). Second, the court stated that the simplicity of the facts underlying the charges and the complexity of the legal argun ents that respondents could assert in their defense justified a presumption that the prosecutor had increased the charges solely because respondents elected to stand trial (*id.* at 9a). Third, the prosecutor's decision to drop the second charge against respondents once they chose to stand trial manifested, in the court of appeals' view, "a disturbing willingness to toy with the defendants" (*id.* at 10a). Finally, the court concluded that the prosecutor had a motive for acting vindictively. Because many of the demonstrators had expressed an intention to contest the

charges on First Amendment grounds, the court stated, "[t]he government had a strong incentive to try to keep clear of this courtroom morass" and "to avoid the annoyance and expense of prosecuting these minor cases at a potentially drawn-out trial" (*ibid.*). The court therefore concluded that it was appropriate to presume that the prosecutor had acted vindictively and to shift to him the burden of going forward to show that his conduct was not the product of vindictiveness. Because the government made no attempt, in the court's view, to rebut the presumption of vindictiveness, the court upheld the district court's conclusion that the government had acted vindictively (*id.* at 10a-13a).

The court of appeals also upheld the district court's remedy – dismissal of the original misdemeanor charge – even though the original charge was untainted by any allegation of prosecutorial vindictiveness (App., *infra*, 13a-15a). The court held that a district court may dismiss an untainted charge in order to deter prosecutors from acting vindictively in the future (*id.* at 14a).

4. The court of appeals granted the government's suggestion for rehearing en banc, but the court later vacated that order and reinstated the panel opinion (App., *infra*, 22a). Five judges dissented from the order vacating the decision to rehear the case en banc (*id.* at 41a-48a (opinion of Bork, J.)).

REASONS FOR GRANTING THE PETITION

Because it affects the traditional independence of the prosecutor to select charges and decide what plea dispositions to accept, the doctrine of vindictive prosecution has been restricted to cases in which there has been a compelling need for judicial intervention. By applying a presumption of vindictiveness to a prosecutor's pretrial charging decision, the court of appeals has extended the doctrine of vindictive prosecution well beyond the limits established

by this Court. The court of appeals' decision is contrary to this Court's precedents in three respects.

First, the court of appeals' holding that the prosecutor's action was presumptively invalid cannot be reconciled with this Court's 1982 decision in *United States* v. *Goodwin,* 457 U.S. 368, in which the Court refused to adopt any such presumption in the context of a pretrial increase in charges. *Second,* by ignoring the fact that respondents were free to forfeit $50 collateral on the original misdemeanor charge and thereby end the case, the court of appeals failed even to consider this Court's decisions that a prosecutor does not act vindictively when he does no more than present a defendant with the alternatives of pleading guilty to a lesser offense or standing trial on an enhanced charge. *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978); *Corbitt* v. *New Jersey,* 439 U.S. 212 (1978). *Third,* by upholding the dismissal of the original, untainted misdemeanor charge solely to deter other prosecutors from acting vindictively, the court of appeals confused the question whether the prosecutor was culpable with the question whether respondents were prejudiced by the prosecutor's actions. The court of appeals thus endorsed a sanction that conflicts with the one this Court has approved for cases of prosecutorial vindictiveness (*Blackledge* v. *Perry,* 417 U.S. 21, 31 n.8 (1974)) and that is inconsistent with "the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests" (*United States* v. *Morrison,* 449 U.S. 361, 364 (1981)).

1. a. In *United States* v. *Goodwin, supra,* the defendant was charged by a police officer with several misdemeanors and petty offenses, and the case was initially handled by a prosecutor with limited authority. Plea negotiations broke down, and the defendant demanded a jury trial. The case was then transferred to another prosecutor, who added a felony charge after reviewing the case.

The court of appeals believed that this series of events justified a presumption that the new charge was added to punish the defendant for exercising his right to a jury trial. This Court reversed. The court rejected the claim that a prosecutor's decision to increase charges against a defendant before trial is presumptively unlawful even if the defendant demands a jury trial. 457 U.S. at 380-384. Thus, "the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified" (*id.* at 382-383). That is true, the Court explained, because "[t]he possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness is certainly not warranted" (*id.* at 384 (emphasis in original)). In that setting, the Court held, the defendant may obtain relief only by proving actual vindictiveness, *i.e.*, "that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do" (*id.* at 384).

This Court has recently reaffirmed the principle of *Goodwin*, that a prosecutor's decision to increase the charges against a defendant is presumptively valid even if the increase comes after the defendant has exercised some legal right. See *Thigpen* v. *Roberts*, 468 U.S. 27, 30 n.4 (1984) (the "presumption [of vindictiveness] does not apply when charges are enhanced following a pretrial demand for a jury trial"); *Wasman* v. *United States*, 468 U.S. 559, 568 (1984) (plurality opinion). Other courts of appeals that have addressed the issue since *Goodwin* have likewise found the presumption of vindictiveness inapplicable to pretrial charging decisions. See *United States* v. *Oliver*, 787 F.2d 124, 126 n.1 (3d Cir. 1986); *United States* v. *Martinez*, 785 F.2d 663, 668-669 (9th Cir. 1986); *United States* v. *Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. 1982).

The court of appeals disregarded this principle. According to the court of appeals, the Court in *Goodwin* did not mean to hold that the presumption of vindictiveness is generally inapplicable in the pretrial setting, but only that it is inapplicable to cases identical to *Goodwin*. Slight changes in the circumstances, the court of appeals held, can require the invocation of the presumption even in the pretrial context (App., *infra,* 8a-10a; *id.* at 30a (opinion of Mikva, J.)).

That proposition finds no support in the *Goodwin* decision. *Goodwin* did not suggest that the applicability of the presumption of vindictiveness turns on the precise facts of each case. On the contrary, because of the circumstances common to the pretrial stage of all cases, the Court in *Goodwin* concluded that the presumption of vindictiveness should not be applied in the pretrial stage at all. See 457 U.S. at 381-384.

b. In any event, the distinctions drawn by the court of appeals between this case and *Goodwin* are not persuasive, and do not justify finding the prosecutor's charging decision in this case to be vindictive. The "most important" reason for invoking the presumption of vindictiveness, according to the court of appeals, was that the government treated the demonstrators who decided to stand trial differently from those who forfeited the $50 collateral (App., *infra,* 8a). Yet that difference in treatment was due to the fact that the other demonstrators forfeited collateral or pleaded no contest pursuant to a form of plea bargaining codified by rule of court. That difference is an inevitable (and permissible) result of plea bargaining and raises no due process issue. In *Corbitt* v. *New Jersey,* 439 U.S. at 223-224, this Court held that a variance in the penalties received by different defendants does not give rise to a presumption that one who receives a more severe punishment has been a victim of retaliation when the difference stems from plea bargaining. The proposition embraced by the

court of appeals is not significantly different from the one this Court rejected in *Corbitt*.

The court of appeals also found (App., *infra*, 9a) that "[t]he simplicity and clarity of both the facts and law" relevant to the case gave rise to a suspicion that the prosecutor added the new misdemeanor charge for the purpose of retaliation. That conclusion ignores the fact that no prosecutor had undertaken any legal analysis of the case until respondents declined to forfeit collateral and their cases were referred to the United States Attorney. *Goodwin* refused to bind the government to the charging decision made by a lawyer who lacked authority to indict or try a felony prosecution. It necessarily follows that the government should not be bound by the charging decision made by an arresting police officer.[4]

The court of appeals also emphasized the fact that the prosecutor sought to dismiss the additional misdemeanor charge once the district court concluded that respondents were entitled to a jury trial, believing that the prosecutor's action evidenced "a disturbing willingness to toy with the defendants" (App., *infra*, 10a). Yet there is nothing improper in a prosecutor's judgment that a case is not sufficiently serious to warrant the additional commitment of resources necessary for a jury trial. That judgment, made every day by prosecutors, is a proper exercise of prosecutorial discretion. The decision to dismiss a count rather than needlessly to spend additional resources hardly sup-

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[4] There is also no basis for the court of appeals' supposition that the prosecutor who initially examined this case had an "institutional" desire to punish respondents for exercising their rights (App., *infra*, 11a). No facts are cited to support that assertion, and the only decision cited by the court of appeals, *Thigpen* v. *Roberts*, *supra*, did not involve a prosecutor's pretrial decision to increase the charges against a defendant. The *Thigpen* case, like *Blackledge* v. *Perry*, *supra*, involved a prosecutor's decision to increase charges against a defendant who sought a trial de novo after he had been convicted.

ports a finding that the earlier decision to add the charge was retaliatory.

2. The court of appeals' decision was wrong for a second reason as well. Even after the prosecutor added the second charge, each respondent had the opportunity to forfeit the $50 collateral in full satisfaction of the charges and thereby avoid any risk of suffering a more severe penalty following a trial. The prosecutor made clear during the hearing on respondents' motion to dismiss that each respondent could forfeit collateral, as was noted on the original citations, and end the case (9/11/85 Tr. 21).[5] Thus, even if respondents were correct that the prosecutor added the second misdemeanor charge to "coerc[e] or pressur[e]" them to forfeit collateral rather than to stand trial (*id.* at 16-17), respondents would be entitled to no relief. The Court's decision in *Bordenkircher* v. *Hayes, supra,* makes clear that a prosecutor does not act unlawfully if he brings additional charges against a defendant to encourage him to plead guilty to a lesser offense.[6]

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[5] At the hearing on respondents' motion, the parties disputed whether the prosecutor had renewed the offer to appellees to forfeit the $50 collateral in satisfaction of the charges before the hearing began. There is no dispute, however, that the prosecutor stated at the hearing that respondents had that option. It is therefore clear that, regardless of what transpired before the hearing began, respondents at that point had a choice between pleading guilty and incurring a lesser penalty, or going to trial and facing a more severe penalty (albeit only on the original misdemeanor charge).

[6] *Bordenkircher* held that due process does not prohibit a prosecutor from carrying out a threat made during plea negotiations to bring additional charges against the accused if he refuses to plead guilty to the original charge and demands a trial. 434 U.S. at 363-365. The Court explained that, by approving and encouraging the practice of plea bargaining, it had endorsed as legitimate a prosecutor's decision to exercise charging discretion in order to encourage a defendant to plead guilty. *Id.* at 363. See *Goodwin,* 457 U.S. at 378 (cases preceding *Bordenkircher* involving plea bargaining had "accepted as constitutionally legitimate the simple reality that the prosecutor's interest at

Accordingly, neither the reason underlying the prosecutor's exercise of charging discretion, nor the fact that he "openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution," violated due process. *Bordenkircher,* 434 U.S. at 364-365; see also *Goodwin,* 457 U.S. at 378-379 & n.10. Once again, every other court of appeals that has addressed the issue has found it lawful for the prosecution to employ such pressures as part of the give and take of plea bargaining. *People of the Territory of Guam* v. *Fegurgur,* 800 F.2d 1470, 1473 (9th Cir. 1986), cert. denied, No. 86-1194 (Mar. 23, 1987); *United States* v. *Oliver,* 787 F.2d 124 (3d Cir. 1986); *Luna* v. *Black,* 772 F.2d 448 (8th Cir. 1985); *United States* v. *Cole,* 755 F.2d 748 (11th Cir. 1985).[7]

3. The court of appeals also was fundamentally wrong in upholding the dismissal of the original misdemeanor

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the bargaining table is to persuade the defendant to forgo his constitutional right to stand trial"). There is also no material difference, the Court held, between a prosecutor's decision to dismiss the charges originally brought against the defendant in exchange for his entry of a guilty plea, and a prosecutor's decision to add new charges against the defendant if plea negotiations fell apart. *Bordenkircher,* 434 U.S. at 360-361, 365.

[7] In its effort to distinguish *Goodwin,* the court of appeals asserted that the prosecutor had a motive for acting vindictively: he might have added the second misdemeanor charge to convince respondents to abandon their First Amendment challenges to this prosecution and to deter other demonstrators from raising similar claims (App., *infra,* 10a). But increasing the charges against a defendant to induce him to plead guilty rather than to stand trial is precisely what *Bordenkircher* permits a prosecutor to do. The fact that the effect of a guilty plea would be that respondents would abandon their First Amendment claims does not render *Bordenkircher* any less applicable. It is therefore irrelevant whether that motivation played any part in the prosecutor's decision.

charge lodged by the Park Police, a charge that was untainted by any allegation of vindictiveness. The court of appeals reasoned that there must be some penalty for the improper addition of a charge, and that the trial judge had the discretion to dismiss the original charge in order to deter such conduct by other government lawyers. The fact that respondents could claim no illegality in the original charge, or any prejudice in defending against it traceable to the misconduct, the court held, was inconsequential.

That ruling was plainly in error. "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith* v. *Phillips,* 455 U.S. 209, 219 (1982). As Judge Bork explained below (App., *infra,* 47a-48a), there is no valid reason that respondents should be given immunity on valid charges because of misconduct by the prosecutor concerning another charge that did not impair their defense to the original misdemeanor count. This Court made clear in *United States* v. *Morrison,* 449 U.S. at 365 (footnote omitted), that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." As the Court explained (*id.* at 364), "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Cf. *United States* v. *Payner,* 447 U.S. 727 (1980) (district courts lack supervisory power to suppress evidence tainted by illegality that did not violate a defendant's constitutional rights); *United States* v. *Mitchell,* 322 U.S. 65, 70-71 (1944) (courts' inherent power to "shap[e] rules of evidence relates to the propriety of admitting evidence" and "is not to be used as an indirect mode of disciplining misconduct").

In addition to being inconsistent with the principles of *Morrison,* the court of appeals' ruling conflicts with this Court's decision in *Blackledge* v. *Perry, supra.* In *Blackledge,* this Court made clear that the presumption of vindictiveness adopted in that case would not provide a defendant with immunity from prosecution, as the dissent feared (417 U.S. at 39 (Rehnquist, J., dissenting)). "Contrary to the dissenting opinion, our decision today does not 'assure that no penalty will be imposed' on respondent. * * * While the Due Process Clause * * * bars trial of Perry on the felony assault charges in the Superior Court, North Carolina is wholly free to conduct a trial *de novo* in the Superior Court on the original misdemeanor assault charge." *Id.* at 31 n.8. The Ninth and Sixth Circuit subsequently followed *Blackledge* on that point, and the decisions of those courts therefore also conflict with the decision of the court of appeals in this case.

In *United States* v. *Hollywood Motor Car Co.,* 646 F.2d 384 (9th Cir. 1981), rev'd on other grounds, 458 U.S. 263 (1982), the defendant advanced the same argument that the court of appeals accepted in this case: that all of the counts in an indictment, tainted and untainted alike, must be dismissed once the government has acted vindictively, since allowing the government to proceed on the original charges would undermine the deterrent effect of the prohibition against prosecutorial vindictiveness. The Ninth Circuit disagreed. Relying on this Court's decision in *United States* v. *Morrison, supra,* the Ninth Circuit ruled that the government could go forward on the original, untainted counts because the defendant had not established "a pattern of recurring violations" necessary before a court could consider whether to dismiss an indictment. *Hollywood Motor Car,* 646 F.2d at 389. Similarly, in *United States* v. *Andrews,* 633 F.2d 449 (1980) (en banc), cert. denied, 450 U.S. 927 (1981), the Sixth Circuit ruled that "the ordinary remedy" for prosecutorial vindictive-

ness "is to bar the augmented charge." 633 F.2d at 455. The decision below is flatly inconsistent with the approach endorsed in *Blackledge*, *Hollywood Motor Car*, and *Andrews*, and for that reason as well, it warrants review by this Court.

4. In addition to being inconsistent with this Court's precedents on the subject of vindictive prosecution and the decisions of other courts of appeals that have applied those precedents, the decision of the court of appeals in this case may significantly hamper the functioning of the magistrates' citation system in cases involving mass demonstrations in the District of Columbia (see App., *infra*, 42a, 48a (opinion of Bork, J.)). The only evidence that respondents adduced to support their due process claim was that some protestors chose to forfeit collateral on a charge listed by an arresting officer, that the cases of other demonstrators who chose to stand trial were forwarded to a prosecutor for his review, and that, after reviewing the case, the prosecutor brought an additional misdemeanor charge against respondents. In *Goodwin*, this Court put to rest the notion that this sequence of events gives rise to a presumption of vindictiveness. Nonetheless, the court of appeals ruled that the events of this case—a scenario that is likely to be repeated in other mass protests in the District of Columbia—dictated a presumption that the prosecutor was vindictively motivated. Unless the court of appeals subsequently treats this decision as nothing more than "a restricted railroad ticket, good for this day and train only" (*Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)), the court's ruling will disrupt the government's ability expeditiously to handle the type of mass demonstrations that are a commonplace in the District of Columbia.[8]

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[8] The court of appeals offered three reasons why its holding may not bind prosecutors in the District of Columbia to all charging decisions of arresting officers, but none of those reasons stands up under

That result would be unfortunate for both the government and defendants. Prosecutors must be able to reassess charging decisions made by the police since "[a] policeman on the scene cannot be expected to assay the evidence with the technical precision of a prosecutor drawing an information." *Washington Mobilization Committee* v. *Cullinane,* 566 F.2d 107, 123 (D.C. Cir. 1977). In addition, the fact that some defendants select a summary disposition of charges does not mean that a prosecutor must treat every other defendant in the same way. *Newman* v. *United States,* 382 F.2d 479, 481-482 (D.C. Cir. 1967) ("Two persons may have committed what is precisely the same legal offense[,] but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges."). The alternatives to the present system are also burdensome. The government could forgo use of the

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analysis. First, the court of appeals stated that "such a holding is limited to the precise circumstances of this case; in other cases, with different facts, the presumption may not lie" (App., *infra,* 12a). That prediction is unconvincing. The circumstances to which the court of appeals attached significance are likely to be present in virtually every case involving arrests during demonstrations in the District of Columbia.

Second, the court of appeals said that the government can always rebut the presumption of vindictiveness (App., *infra,* 12a). That suggestion is, of course, no justification for adopting an erroneous presumption to begin with. Moreover, the court of appeals' suggestion is more fiction than fact, since the prosecutor offered a legitimate explanation for the second charge (9/11/85 Tr. 21; page 4 note 3, *supra*), and the court of appeals ignored it.

Finally, relying on *Bordenkircher,* the court of appeals suggested "the possibility" (the court went no further) that the government could note on citation forms that a person will expose himself to enhanced charges if he decides to stand trial (App., *infra,* 12a-13a). It is hard to believe that the court of appeals, having found that it was improper for the prosecutor to increase the charges against respondents after they requested a jury trial, would allow a prosecutor to strike "foul" blows (*Berger* v. *United States,* 295 U.S. 78, 88 (1935)) as long as they are telegraphed in advance.

magistrates' citation system, or at least preclude anyone from forfeiting collateral until a prosecutor has reviewed the charges. Obviously, any such procedure would be cumbersome and costly. Permitting petty offenders to dispose of their charges expeditiously by forfeiture of collateral, without prosecutorial review, is a valuable, cost-effective procedure. Moreover, allowing a defendant to terminate a case by immediately forfeiting collateral is advantageous from his perspective, since it permits him to dispose of the charges quickly, without awaiting prosecutorial review and without risking a possible jail sentence.[9] Accordingly, the procedures for forfeiting collateral should not be encumbered by requiring or encouraging preview of the charges by prosecutors, which is a necessary result of the court of appeals' ruling. The degree to which that ruling undercuts the utility of a system as beneficial as the system of magistrate citations is powerful evidence that the court of appeals' decision is untenable in the first place.

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[9] Cf. *United States* v. *Mills*, 472 F.2d 1231, 1239-1241 (D.C. Cir. 1972) (en banc), in which the court of appeals held that the opportunity to post collateral was such a crucial procedural right that a search ancillary to booking, which was conducted without first advising the defendant of his right to post collateral and leave the stationhouse, violated the Fourth Amendment. Accord *United States* v. *Robinson*, 471 F.2d 1082, 1101-1103 (D.C. Cir. 1972) (en banc), rev'd on other grounds, 414 U.S. 218 (1973).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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OCTOBER 1987

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE MEYER, ET AL.

No. 85-6171

UNITED STATES OF AMERICA, APPELLANT

v.

THERESA FITZGIBBON, ET AL.

No. 85-6172

UNITED STATES OF AMERICA, APPELLANT

v.

VIRGINIA SENDERS, ET AL.

Appeals from the United States District Court
for the District of Columbia
(Criminal Nos. 85-00329-01, 85-00330-01
and 85-00331-01)

Argued September 11, 1986

Decided February 13, 1987

Before: WALD, *Chief Judge*, MIKVA, *Circuit Judge*, and LEIGHTON,* *Senior District Judge*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: In this case, we review a district court's decision to dismiss several informations on the ground of prosecutorial vindictiveness. The government contends that the district court's finding of vindictiveness is wrong as a matter of law and perilous as a matter of policy. The government further contends that even if vindictive prosecution occurred, the remedy that the district court imposed is unwarranted. We decline to accept these claims. According proper deference to the lower court, we affirm its order to dismiss.

I. BACKGROUND

On April 22, 1985, officers of the United States Park Police arrested approximately 200 political demonstrators outside of the White House. The officers gave each demonstrator a U.S. Park Police Citation Form, issued pursuant to the District of Columbia's "magistrates" citation system." Each form charged the recipient with "demonstrating without a permit" in violation of 36 C.F.R. § 50.19 and described two options for disposing of the charge. According to the form, the arrestee could either forfeit $50 in full satisfaction of the charge or proceed to trial. The maximum penalty on the specified charge was a $500 fine and six months' incarceration.

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*Of the United States District Court for the Northern District of Illinois, sitting by designation pursuant to 28 U.S.C. § 294(d).

Although most of the demonstrators chose to forfeit $50, some elected to proceed to trial. At their arraignments, which took place on May 29, June 21, and June 28, 1985, these persons learned that they would have to defend themselves against a further charge. The government had filed two-count informations against the demonstrators who had chosen to exercise their right to trial. Count II of the informations contained the original charge of demonstrating without a permit. Count I contained an additional charge of obstructing the sidewalks adjacent to the White House in violation of 36 C.F.R. § 50.30, which also carries a maximum penalty of six months' imprisonment and a $500 fine. The government extended a plea offer to some of the defendants, under which the government would dismiss Count I of the information and recommend a sentence of six months' unsupervised probation on Count II if the defendant pleaded no contest to the latter count. A number of the defendants accepted this plea arrangement, but 36 chose to go to trial.

On July 30, 1985, counsel for the defendants moved to dismiss the informations on the ground of vindictive prosecution. Counsel also requested a jury trial, noting that the addition of a second charge and the enhanced potential sentence had triggered the defendants' jury trial right. The district court granted the motion for a jury trial and found the defendants' counsel had raised sufficient question concerning prosecutorial vindictiveness to warrant a separate hearing on the issue.

At the hearing on vindictiveness, which occurred on September 11, 1985, the prosecutor immediately moved to dismiss Count I (the added count) of each of the informations. Counsel for the defendants objected, claiming that the sole purpose of the motion was to deprive the defendants of their right to a jury trial. The district court, however, granted the prosecutor's motion to dismiss the

added count. The court then heard argument on the defendants' motion to dismiss the informations (which now contained only the original count) on the ground of prosecutorial vindictiveness. The court found that the prosecutor had added a count to the informations solely because the defendants had exercised their right to trial and that such a course of action constituted vindictive prosecution. The court chose to remedy this prosecutorial misconduct by dismissing the informations. After the court denied the government's motion for reconsideration, *see* Joint Appendix at 99-102, the government filed this appeal.

II. Discussion

Our first task is to determine the appropriate standard of review in a vindictive prosecution case. Although this court has never faced the question, we find the matter fairly easy to resolve. An appellate court must use the clearly erroneous standard to review a trial court's finding of vindictive prosecution. The clearly erroneous standard ordinarily governs review of a judge's findings in a criminal case on issues other than the defendant's guilt, *see Campbell v. United States*, 373 U.S. 487, 493 (1963); *Jackson v. United States*, 353 F.2d 862, 864-65 (D.C. Cir. 1965); the standard governs review not only when the judge's findings are purely factual, but also when they involve mixed questions of law and fact, *see United States v. Hart*, 546 F.2d 798, 801-02 (9th Cir. 1976) (en banc). We can perceive no reason for departing from this general rule in cases of vindictive prosecution, *accord United States v. Spiesz*, 689 F.2d 1326, 1329 (9th Cir. 1982); an appellate court may overturn a judge's finding of vindictiveness only when a review of all of the evidence leaves the court "with the definite and firm conviction that a mistake has been committed," *see United States v. United States Gypsum*

Co., 333 U.S. 364, 395 (1948) (defining the clearly erroneous standard). A lower court's decision to dismiss an information or indictment, once a finding of vindictive prosecution has been appropriately made, is subject to a different standard of review. The choice of remedy for governmental misconduct rests within the sound discretion of the lower court; an appellate court may reverse an order remedying such misconduct only if the order constitutes an abuse of discretion. *See United States v. Artuso*, 618 F.2d 192, 196 (2d Cir.), *cert. denied*, 449 U.S. 861. Thus, in reviewing the district court's order to dismiss the informations on the ground of prosecutorial vindictiveness, we must ask a pair of questions: first, whether the finding of vindictiveness is clearly erroneous; and second, if the finding is not clearly erroneous, whether the decision to dismiss the information constitutes an abuse of the trial court's discretion.

A. ***The Finding***

"Prosecutorial vindictiveness" is a term of art with a precise and limited meaning. The term refers to a situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. *See United States v. Goodwin*, 457 U.S. 368, 372 (1982). In other words, a prosecutorial action is "vindictive" only if designed to penalize a defendant for invoking legally protected rights.

The Supreme Court has established two ways in which a defendant may demonstrate prosecutorial vindictiveness. First, a defendant may show "actual vindictiveness"—that is, he may prove through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights. *See id.* at 380-81, 384 & n.19. This showing is, of course, exceedingly difficult to make. Second, a defendant may in certain circumstances rely on a presumption of vindictiveness: when the facts indicate "a realistic likelihood

of 'vindictiveness[,]' " a presumption will arise obliging the government to come forward with objective evidence justifying the prosecutorial action. *See Blackledge v. Perry*, 417 U.S. 21, 27-29, 29 n.7 (1974). If the government produces such evidence, the defendant's only hope is to prove that the justification is pretextual and that actual vindictiveness has occurred. But if the government fails to present such evidence, the presumption stands and the court must find that the prosecutor acted vindictively.

The district court in this case held that the defendants had shown actual vindictiveness, but we decline to reach this question. We uphold the ultimate finding—that prosecutorial vindictiveness entered into this case—as not clearly erroneous because we believe that the defendants presented evidence that would allow a court at least to find that a presumption of vindictiveness applied. The government declined to come forward with any evidence that would erase such a presumption and thus doomed itself to the critical finding.

The government contends that a presumption of prosecutorial vindictiveness can never apply in a pretrial setting and rests this claim on the Supreme Court's opinion in *United States v. Goodwin*. A magistrate had arraigned Goodwin on several misdemeanor charges, and an attorney from the Department of Justice, who had authority to try only petty crime and misdemeanor cases, took over the case. Plea negotiations ensued, but proved fruitless, and Goodwin asserted this right to a jury trial. Subsequently, an Assistant U.S. Attorney assumed responsibility for the case, and he proceeded to indict Goodwin on more serious charges. *See Goodwin*, 457 U.S. at 370-71. Goodwin argued that the facts supported a presumption of vindictive prosecution, but the Supreme Court disagreed. The Court had previously held that post-trial prosecutorial decisions to file increased charges automatically give rise to a presumption of vindictiveness.

See Blackledge, 417 U.S. at 27-29. The Supreme Court held in *Goodwin* that this prior ruling did not control because the prosecutor had entered increased charges against Goodwin prior to trial. *See Goodwin*, 457 U.S. at 381. The government appears to draw from this option the broad principle that a presumption of vindictiveness can never apply in a pretrial context. *See* Brief for Appellant at 18.

We find the government's reading of *Goodwin* unpersuasive. The Supreme Court in *Goodwin* declined to adopt a *per se* rule applicable in the pretrial context that a presumption will lie whenever the prosecutor "ups the ante" following a defendant's exercise of a legal right. *See Goodwin*, 457 U.S. at 381 ("There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting."). But the Court also declined to adopt a *per se* rule that in the pretial context no presumption of vindictiveness will ever lie. The lesson of *Goodwin* is that proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not alone give rise to a presumption in the pretrial context. The rationale supporting the Court's teaching is that this sequence of events, taken by itself, does not present a "realistic likelihood of vindictiveness." *See id.* at 381-84. But when additional facts combine with this sequence of events to create such a realistic likelihood, a presumption will lie in the pretrial context. Several post-*Goodwin* courts have adopted this view. They have recognized, as we do today, that a presumption of vindictiveness will lie in the pretrial setting if the defendant presents facts sufficient to show a realistic likelihood of vindictiveness. *See United States v. Krezdorn* 718 F.2d 1360, 1364-65 (5th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984); *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168-69 (9th Cir. 1982). The critical question in this case, as in all others, is whether the defendants have presented

such facts—whether the defendants have shown that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a presumption. We answer this question in the case at bar by holding that the defendants have made a showing sufficient to preclude us from reversing the lower court.

We begin by noting a set of predicate facts that *Goodwin* and the case at bar have in common. In both cases, of course, the prosecutor increased the charges against the defendants after the defendants had asserted their constitutional rights. In neither case did the defendants have any notice of this possibility: at no time had the prosecutors informed the defendants that they might face increased charges if they chose to go to trial. Finally, in neither *Goodwin* nor the case at bar had the defendants' own conduct after the initial charging decision given the government a legitimate reason to enhance the charges. These circumstances alone, of course, fail to support a realistic likelihood of prosecutorial vindictiveness; the Supreme Court's decision in *Goodwin* held as much. We note them because they combine with other circumstances in the case to suggest a retaliatory motivation.

Perhaps the most important of the circumstances peculiar to this case is the government's disparate treatment of the defendants who elected to go to trial and the defendants who elected to forego their trial rights. All of the defendants participated in the same demonstration and conducted themselves in the same manner. Yet the defendants who chose to go to trial faced two charges, whereas the other defendants confronted only one. This disparate treatment must give rise to a suspicion that the government discriminated among the defendants on the basis of their divergent decisions whether to exercise their right to trial. The facts in this case thus support, far more than did the facts in *Goodwin*, a finding of a realistic likelihood of prosecutorial vindictiveness.

The simplicity and clarity of both the facts and law underlying these prosecutions heightens the suspicions of prosecutorial vindictiveness. Governmental officials often make their initial charging decisions prior to gaining full knowledge or appreciation of the facts involved in a given case. In addition, officials often make charging decisions before analyzing thoroughly a case's legal complexities. The decision in *Goodwin* stemmed largely from the Supreme Court's understanding of these facts: the *Goodwin* Court recognized the frequency with which prosecutors must act on (and later compensate for) incomplete information or understanding. *See Goodwin*, 457 U.S. at 381. But the case at bar appears to present few problems of this kind; not even the government contests the simplicity and straightforwardness of either the conduct involved in this case or the law relating to that conduct. Thus, the suspicion must grow that the prosecutor increased the charges not because of any further factual investigation or legal analysis, but because the defendants chose to exercise their constitutional right to trial.

The government's conduct *after* levelling the increased charges against the defendants also lends support to a finding of a realistic likelihood of vindictiveness. At the very beginning of the hearing on prosecutorial vindictiveness, the government moved to drop the charge that it had so recently added to each information. Perhaps the government official responsible for the prosecutions acted in good faith; perhaps he merely changed his mind a second time. But when we look at the government's action in the context of the entire case, we find this possibility difficult to accept. The remaining defendants certainly had good reason to think that the government dropped the additional charges in order to avoid the necessity of a *jury* trial, which the district court had granted to the defendants on the basis of the enhanced charges. We find in this

prosecutorial action, viewed in context, a disturbing willingness to toy with the defendants, and we think that a lower court may take this kind of willingnesss into account in determining whether a presumption of vindictiveness will lie.

Finally, we take into consideration the government's motivation to act vindictively in this case. The *Goodwin* Court expressed doubt that in the run-of-the-mill pre-trial situation, the prosecutor would have any reason to engage in vindictive behavior; the Court noted that defendants routinely assert procedural rights prior to trial and that prosecutors are unlikely to respond vindictively to this everyday practice. *See id.* at 381. But the prosecutor in this case confronted something other than routine invocations of procedural rights on the part of individual defendants. In this case, a large group of defendants threatened to go to trial on what the government considered "petty offenses." *See* Brief for Appellant at 3 n.3. Many of these defendants had indicated their intention to proceed *pro se*. Many had determined to raise first amendment claims during the course of the trial. The government had a strong incentive to try to keep clear of this courtroom morass: it wished to avoid the annoyance and expense of prosecuting these minor cases at a potentially drawn-out trial. The Supreme Court previously had recognized that the government's interest in discouraging unexpected and burdensome assertions of legal rights may rise to a level that supports use of a presumption of vindictiveness. *See Blackledge*, 417 U.S. at 27. Although this governmental interest rarely rises to such a level in the pretrial context, *see Goodwin*, 457 U.S. at 381, we view the governmental stake in the instant case as sufficiently signficant to count toward use of the presumption.

The government asserts that assuming *arguendo* a presumption of vindictiveness can arise in a pretrial context, the various factors we have mentioned fail to support

use of a presumption in the case at bar. Essentially, the government contends that no presumption will lie because the "routine and benign procedures necessitated by the magistrates' citation system" explain the increased charges. *See* Brief for Appellant at 23. According to the government, the prosecutor only sees the case once the defendant has decided to go to trial; thus, any decision he makes to increase charges occurs in the course of routine prosecutorial review and in no way indicates vindictiveness. *See id.* at 21-24.

We reject this argument. The Supreme Court's decisions concerning vindictive prosecution have focused on the conduct of the government as a whole, rather than on the conduct or retributive sentiments of a single prosecutor. In *Thigpen v. Roberts*, 468 U.S. 27 (1984), for example, the Supreme Court states that a presumption of vindictiveness "does not hinge on the continued involvement of a particular individual. A district attorney burdened with the retrial might be no less vindictive because he did not bring the initial prosecution. Indeed, *Blackledge* referred frequently to actions by 'the State,' rather than 'the prosecutor.' " *Id.* at 31 (citation omitted). Thus, the government cannot defeat the defendants' argument that a presumption should arise in this case merely by pointing out that two different individuals made the charging decisions. Neither can the government defeat the defendants' argument by noting that the first charging official was not a government attorney. The magistrates' citation system makes the police officer no less than the prosecutor a member of the prosecution team. We view their actions in conjunction, and we view the process of which they are a part as a whole. To do otherwise would be to ignore that the desire to punish defendants for exercising their legal rights arises more often from institutional than from personal wellsprings.

The government also argues that use of a presumption in this case will have dangerous policy consequences. The government contends that such a result will bind prosecutors to the charging decisions of arresting officers and thereby destroy or disable the magistrates' citation system. *See* Brief for Appellant at 36-40. We are not convinced. Even if our holding were to bind prosecutors to all charging decisions of arresting officers, we think the government would suffer no great loss. These charging decisions bind the government when defendants forego their right to trial; we fail to understand why the government believes it needs broad-ranging discretion to up the ante when defendants choose to exercise their trial rights. Moreover, a holding that the circumstances of this case support the use of a presumption will not bind prosecutors to all charging decisions of arresting officers. First, such a holding is limited to the precise circumstances of this case; in other cases, with different facts, the presumption may not lie. Second, even when a court uses a presumption, the government has the opportunity to rebut it; thus, the initial charging deicison "binds" the government only to the extent that the government has no legitimate and articulable reason for changing that decision. Third, the government may be able to escape the presumption altogether by providing notice to the accused. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Supreme Court held that no vindictiveness occurred when a prosecutor informed a defendant during plea bargaining that he might face increased charges if he chose to go trial: the Court stated that a prosecuor who "openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution . . . did not violate the Due Process Clause." *See id.* at 365. This holding suggests the possibility that in order to satisy constitutional requirements, the government need only note on the Citation Form that the de-

fendant will expose himself to enhanced charges if he elects to go to trial. For all of these reasons, we think the government's apprehension of the impending demise of the magistrates' citation system is greatly exaggerated.

The government's arguments thus fail to convince us that the circumstances of this case, when viewed in their entirety, cannot support a realistic likelihood of vindictiveness. Because the government has never attempted to rebut the presumption that arises when a realistic likelihood of vindictiveness exists, we cannot reverse the district court's finding of prosecutorial vindictiveness under a clearly erroneous standard. Put simply, we have reviewed all of the evidence, and it has not left us with the "definite and firm conviction that a mistake has been committed." *See United States Gypsum Co.*, 333 U.S. at 395.

B. ***The Remedy***

The district court chose to remedy the governmental misconduct in this case by dismissing the informations. The government vehemently attacks this choice. As we noted earlier, we can reverse the district court's remedial order only if it constitutes an abuse of discretion. Because we cannot say that the choice of remedy in this case constitutes such an abuse, we reject the government's arguments and affirm the district court's order of dismissal.

The government essentially contends that when confronted with prosecutorial vindictiveness, a court has authority only to dismiss the additional, "tainted" charge. *See* Brief for Appellant at 41. In support of this claim, the government cites several cases in which courts have declined to order any relief other than dismissal of the vindictively motivated charge. *See United States v. Hollywood Motor Car Co.*, 646 F.2d 384, 388-89 (9th Cir. 1981), *rev'd on other grounds*, 458 U.S. 263 (1982); *United States v. Andrews*, 633 F.2d 449, 455 (6th Cir. 1980). The

government concludes that because in this case the prosecutors had already dismissed the additional charge, the district court should have held that "no relief at all was appropriate." Brief for Appellant at 42.

We decline to circumscribe so drastically the remedial authority of district courts in cases marked by prosecutorial vindictiveness. None of the cases that the government cites supports any such broad limitation. In those cases, appellate courts merely stated that dismissal of the additional charge constitutes the usual judicial remedy. *See Hollywood*, 646 at 388-89; *Andrews*, 633 F.2d at 455. In none of the cases cited by the government did the courts strike down a broader remedy ordered by a lower court. Case law thus fails to support the government's proposed approach. Perhaps more important, reason also fails to support the government's position. If in cases of vindictive prosecution the trial court judge may only dismiss the additional charge, the prosecutor will have nothing to lose by acting vindictively. The government's position, if accepted, would remove the deterrent effect of the doctrine of prosecutorial vindictiveness—a doctrine which the Supreme Court *designed* to be largely prophylactic in nature, *see Blackledge*, 417 U.S. at 26. We will not countenance the government's attempt to so vitiate the prohibition against prosecutorial vindictiveness.

Given the trial court's appropriately broad authority to remedy prosecutorial vindictiveness, we cannot say that the district court's decision to dismiss the informations in this case constitutes an abuse of discretion. We note that the remedy is extreme and that the district court judge had no obligation to impose it. *Cf. Hollywood*, 646 F.2d at 389 (stating that the actions of the prosecutor were not "sufficient to *require* the invocation of such an extreme sanction as dismissal of the original, 'untainted' . . . charges" (emphasis added)). The deterrent effect of the rule will remain even if judges resort to this remedy only in

a minority of cases. We therefore do not encourage routine imposition of this broad remedy; indeed, we counsel lower courts to inspect closely both factual circumstances and remedial alternatives before dismissing entire informations. But we uphold the authority of the district court judge to impose that remedy in this case. The judge clearly believed that the circumstances of this case demanded a strong response and that the most appropriate response available was dismissal of the informations. Given the undisputed facts that lie at the base of this appeal, we cannot say the judge acted impermissibly. We therefore affirm.

It is so ordered.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5233

MARY BARTLETT, a/k/a
JOSEPHINE NEUMAN, APPELLANT

v.

OTIS R. BOWEN, SECRETARY,
HEALTH AND HUMAN SERVICES

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 82-00552)

No. 85-6071

JAMES T. MARTIN, JR.

v.

D.C. METROPOLITAN POLICE DEPARTMENT, ET AL.
RICHARD XANDER, ET AL., APPELLANTS

And Consolidated Case No. 85-6072

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 85-00624)

No. 85-6169

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE MEYER, ET AL.

And Consolidated Case Nos. 85-6171 and 85-6172

Appeals from the United States District Court
for the District of Columbia

(Criminal Nos. 85-00329-01, 85-00330-01
and 85-00331-01)

ON SUGGESTION FOR REHEARING *EN BANC*

Filed July 31, 1987

No. 85-5233

MARY BARTLETT o/b/o JOSEPHINE NEUMAN

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Before: WALD, *Chief Judge;* ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, *Circuit Judges*

ORDER

The Court on its own motion, has reconsidered appellee's suggestion for rehearing *en banc*. Upon each reconsideration, it is

ORDERED, by the Court *en banc*, on its own motion, that the order of the *en banc* court of June 8, 1987, and the panel order of the same date, be, and the same hereby are, vacated, and it is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that the judgment, the panel opinion of March 17, 1987 and the dissenting opinion of the same date be, and the same hereby are, reinstated, and it is

FURTHER ORDERED, by the Court *en banc*, that appellee's suggestion for rehearing *en banc* is denied.

The panel filing the opinion of March 17, 1987 is this date entering an order again denying the petition for rehearing directed to it.

Per Curiam

Separate statements are attached, as follows:

1. Circuit Judge Edwards, concurring in the denials of rehearing *en banc,* with whom Chief Judge Wald and Circuit Judges Robinson, Mikva and Ruth B. Ginsburg concur.
2. Circuit Judge Silberman concurring in the denials of rehearing *en banc.*
3. Circuit Judges Bork, Starr, Buckley, Williams and D. H. Ginsburg dissenting from the denials of rehearing *en banc.*
4. Circuit Judge Starr, dissenting from the denials of rehearing *en banc.*

No. 85-6071

JAMES T. MARTIN, JR.

v.

D.C. METROPOLITAN POLICE DEPARTMENT, ET AL
And Consolidated Case 85-6072

Before: WALD, *Chief Judge;* ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, *Circuit Judges*

ORDER

The Court on its own motion, has reconsidered appellants' suggestion for rehearing *en banc*. Upon such reconsideration, it is

ORDERED, by the Court *en banc*, on its own motion, that the order of the *en banc* court of May 8, 1987, and the panel order of the same date, be, and the same hereby are, vacated, and it is

FURTHER ORDERED, by the Court *en banc,* on its own motion, that the Section IV of the opinion February 10, 1987, the dissenting opinion, and the judgment of the same date with respect thereto, be, and the same hereby are, reinstated, and it is

FURTHER ORDERED, by the Court *en banc,* that appellants' suggestion for rehearing *en banc* is denied.

The panel filing the opinion of February 10, 1987 is this date entering an order again denying the petition for rehearing directed to it.

Per Curiam

Separate statements are attached, as follows:

1. Circuit Judge Edwards, concurring in the denials of rehearing *en banc,* with whom Chief Judge Wald and Circuit Judges Robinson, Mikva and Ruth B. Ginsburg concur.
2. Circuit Judge Silberman concurring in the denials of rehearing *en banc.*
3. Circuit Judge Ruth B. Ginsburg, concurring in the denial of rehearing *en banc,* with whom Circuit Judge Edwards concurs.
4. Circuit Judges Bork, Starr, Buckley, Williams and D. H. Ginsburg dissenting from the denials of rehearing *en banc.*
5. Circuit Judge Starr, dissenting from the denials of rehearing *en banc.*

No. 85-6169

UNITED STATES of AMERICA

v.

CHRISTINE MEYER, ET AL.
And Consolidated Case Nos. 85-6171 and 85-6172

Before: WALD, *Chief Judge;* ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, *Circuit Judges*

ORDER

The Court on its own motion, has reconsidered appellants' suggestion for rehearing *en banc.* Upon such reconsideration, it is

ORDERED, by the Court *en banc*, on its own motion, that the order of the *en banc* court of April 30, 1987, and the panel order of the same date, be, and the same hereby are, vacated, and it is

FURTHER ORDERED, by the Court *en banc,* on its own motion, that the judgment and panel opinion of February 13, 1987 be, and the same hereby are, reinstated and it is

FURTHER ORDERED, by the Court *en banc,* that appellant's suggestion for rehearing *en banc* is denied.

The panel filing the opinion of February 13, 1987 is this date entering an order again denying the petition for rehearing directed to it.

Per Curiam

Separate statements are attached, as follows:

1. Circuit Judge Edwards, concurring in the denials of rehearing *en banc,* with whom Chief Judge Wald and Circuit Judges Robinson, Mikva and Ruth B. Ginsburg concur.
2. Circuit Judge Silberman concurring in the denials of rehearing *en banc.*
3. Circuit Judge Mikva, concurring in the denial of the rehearing *en banc.*
4. Circuit Judges Bork, Starr, Buckley, Williams and D. H. Ginsburg dissenting from the denials of rehearing *en banc.*
5. Circuit Judge Starr, dissenting from the denials of rehearing *en banc.*

EDWARDS, *Circuit Judge, concurring in the denials of rehearing en banc,* with whom WALD, *Chief Judge,* ROBINSON, MIKVA, and RUTH B. GINSBURG, *Circuit Judges, concur:* In decrying the "instability and confusion" allegedly created by our orders vacating *en banc* review in these cases, my colleague Judge Starr elevates some imagined precept of immutability and a self-styled notion of orderliness over correctness as a guiding principle. This utterly misperceives the gravity of the decision to accord rehearing *en banc*—a determination that calls for us to exercise the best of our collective wisdom.

Justice Stewart's admonition that " '[w]isdom too often never comes, and so one ought not to reject it merely because it comes late,' " *Boys Markets, Inc. v. Retail Clerks Local 770,* 398 U.S. 235, 255 (1970) (quoting *Henslee v. Union Planters National Bank and Trust Co.,* 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)), is especially apt in this context. The decision to grant *en banc* consideration is unquestionably among the most serious non-merits determinations an appellate court can make, because it may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel. Such a determination should be made only in the most compelling circumstances.

Contrary to the suggestion made by my dissenting colleague, there is absolutely nothing wrong with a majority of this court acting to reconsider and vacate the ill-conceived grants of *en banc* rehearings in these cases. Under the applicable Federal Rules, this court retains the full authority to act on its own motion to determine whether to hear or rehear cases *en banc*. The simple point here is that a majority of this court has now recognized, albeit belatedly, that the cases at hand do not deserve *en banc* treatment.

The dissent urges that *en banc* review is appropriate in these cases because they are cases of "exceptional importance" where the panel's decision allegedly was either "clearly wrong" or "highly dubious". The problem with this view, however, is that it reduces the "exceptional importance" test to a self-serving and result-oriented criterion. Under the dissenters' standard, one judge's case of "exceptional importance" is another judge's "routine or run-of-the-mill" case, a point well-illustrated by the dissenters' specious characterization of *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987). The dissenters have labelled *Bartlett* a "sweeping and revolutionary decision," almost as if to suggest that it represents *the* seminal opinion in constitutional adjudication. Such a statement is quite extraordinary, however, because, as any reader of it can plainly see, the decision in *Bartlett* merely follows well-established Supreme Court precedent.

The dissenters also claim that *Bartlett* "purported to decide the highly controversial question of Congress' power to remove Supreme Court jurisdiction over constitutional challenges under the exceptions clause of article III of the Constitution;" but this is a flagrant misstatement of the opinion. The majority in *Bartlett* merely observed that

> [C]ourts and legal scholars routinely assume that there is a due process right to have the scope of constitutional rights determined by some independent judicial body—and the Supreme Court has never held or hinted otherwise. On the contrary, although it is undisputed that Congress has some leeway to affect the jurisdiction of the lower federal courts, Congress may not deny to a person attacking a statute "the independent judgment of a court on the ultimate question of constitutionality." *St. Joseph Stock Yards Co. v. United States*, 398 U.S. at 84 (Brandeis, J., concurring).

> Although there is no definitive answer to the question whether there are constitutional restraints when Congress seeks to limit the jurisdiction of all *federal* courts, we need not address that question here.

Bartlett, 816 F.2d at 706 (footnote omitted). The majority in *Bartlett* expressly declined to define the full reach of Congress' power under the exceptions clause of article III. *Id.* In light of the dissenters' misstatement of the holding in *Bartlett,* it is difficult to resist the conclusion that my dissenting brethren would like to rehear *Bartlett en banc* so that *they* might create some "sweeping and revolutionary" new law in the area of constitutional adjudication. This would be a gross abuse of the *en banc* process.

My dissenting colleague leaves the impression that rehearings *en banc* involve no significant expenditure of judicial energies. In fact, the institutional cost of rehearing cases *en banc* is extraordinary. Each year, every judge has a heavy schedule of brief-reading, oral arguments, motions work and opinion-writing in connection with cases on the regular calendar. It is an enormous distraction to break into this schedule and tie up the *entire* court to hear one case *en banc.* It especially burdens judges who already are carrying a large backlog of cases, and it substantially delays the case being reheard, often with no clear principle emanating from the *en banc* court.

Underlying the dissenters' calls for rehearings *en banc*—and especially their resort to a "clearly wrong"/"highly dubious" test to determine when to rehear a case *en banc*—is the implicit view that every time a majority of the judges disagree with a panel decision, they should get rid of it by rehearing the case *en banc.* The error in this proposition is the concept that it is somehow desirable that majority rule should determine the outcome of cases. However salutary that principle may be in the context of popularly elected legislatures where a majority decision reflects the will of the voters who chose the

lawmakers, it has no equivalent value in an intermediate court of review. The fact that 6 of 11 judges agree with a particular result does not invest that result with any greater legal validity than it would otherwise have. The reason we use majority rule on a panel is because there must be some device for reaching a decision where there is disagreement among three judges; it is not because correctness is assured by having as many legal minds as possible in agreement.

The dissent's "clearly wrong"/"highly dubious" test not only serves no useful purpose in this intermediate appellate judicial context, it does substantial violence to the collegiality that *is* indispensable to judicial decisionmaking. Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case *en banc* in order to vindicate that judge's position. Politicking will replace the thoughtful dialogue that should characterize a court where every judge respects the integrity of his or her colleagues. Furthermore, such a process would impugn the integrity of panel judges, who are both intelligent enough to know the law and conscientious enough to abide by their oath to uphold it.

The Federal Rules of Appellate Procedure explicitly recognize that *en banc* rehearing is "not favored and ordinarily will not be ordered," except when consideration is necessary to secure or maintain uniformity of decisions or when a case involves a question of exceptional importance. FED. R. APP. 35(a). Under this rule, it is well-understood that it is only in the rarest of circumstances when a case should be reheard *en banc*. In other words, for the appellate system to function, judges on a circuit must trust one another and have faith in the work of their colleagues, including Senior Judges and visiting judges from other circuits. Obviously, no judge agrees with all of the decisions handed down in the circuit, nor would every judge write a particular opinion in the same fashion. But

if such disagreements determined whether or not a case should be reheard *en banc*, the number of *en banc* rehearings would increase at least a hundredfold.

By declining to rehear a case, "[w]e de not sit in judgment on the panel; we do not sanction the result it reached." *Jolly v Listerman*, 675 F.2d 1308, 1311 (D.C. Cir.) (Robinson, C.J., concurring in denial of rehearing *en banc*) (footnote omitted), *cert. denied*, 459 U.S. 1037 (1982). We decide merely that, because the case does not present questions of " 'real significance to the legal process as well as to the litigants,' " review by the full court is not justified. *Id.* at 1310 (quoting *Church of Scientology v. Foley*, 640 F.2d 1335, 1341 (D.C. Cir.) *(en banc)* (dissenting opinion), *cert. denied*, 452 U.S. 961 (1981)).

In conclusion the court's decisions denying the suggestions for rehearing *en banc* in these cases are fully justified and commendably in accord with the legal standards that appropriately guide the determination to rehear a case *en banc*. Anyone who doubts the wisdom of that determination here would be well-advised to go directly to the original panel opinions for an accurate statement of the case holdings.

MIKVA, *Circuit Judge,* concurring in the denial of rehearing *en banc*: I join in Judge Edwards' statement responding to the dissenters. I write additionally to set the record straight on *United States v. Christine Meyer.* In challenging the decision to reinstatate the panel opinion in *United States v. Christine Meyer,* 816 F.2d 295 (1987), the dissenters mischaracterize the panel's holding, and misconceive the facts of the case. More importantly, they misinterpret the relevant decisions of the Supreme Court and imply an effort on the part of the panel to subvert the impact of those Supreme Court cases. Their contentions are untenable.

In *U.S. v. Goodwin,* 457 U.S. 361 (1982), the Supreme Court declined to adopt any per se rules regarding prosecutorial vindictiveness in the pretrial context. The Court determined that the per se rule applicable in the post-trial context was not suitable for pretrial situations. In post-trial cases, a presumption of vindictiveness will lie whenever the prosecutor "ups the ante" following a defendant's exercise of a legal right. On the other hand, the Court refused to adopt a "per se rule" that in the pretrial context *no* presumption of vindictiveness can ever lie. The lesson of *Goodwin* is that proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not *alone* give rise to a presumption in the pretrial context. The rationale supporting the Court's teaching is that this sequence of events, taken by itself, does not present a realistic likelihood of vindictiveness. But when additional facts combine with this sequence of events to create such a realistic likelihood, a presumption will lie in the pretrial context. The critical question is whether the defendants have presented such facts—whether the defendants have shown that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a rebuttable presumption.

The panel's opinion held that the defendants in this case presented evidence that could allow a court to find that there was a realistic likelihood of vindictiveness and that a presumption thus applied. The dissenters at times suggest that the panel "defied" *Goodwin* by holding that a prosecutor's decision to up the ante following a defendant's exercise of a legal right *itself* created a presumption of vindictiveness. The panel held no such thing. It enumerated four very specific factors not present in *Goodwin* that, when added to the prosecutor's decision to increase charges, provided the extra circumstances to support a realistic likelihood of vindictiveness—and therefore an allowable presumption of vindictiveness. Any suggestion that the panel's opinion is more broad is just not so.

When the dissenters do acknowledge the panel's inspection of the actual set of circumstances in the case, they attempt to dismiss them by referring to the prosecutor's recognized interest in conducting plea negotiations. This reasoning is most strange, since there *were no plea negotiations in this case.* The government's decision to increase charges did not occur in the context of plea bargaining. It occurred when the defendants refused to pay the fine assessed against all the other defendants involved and asked for trial. The panel's decision explicitly recognizes that had the prosecutor informed the defendants during plea bargaining that they might face increased charges if they chose to go to trial, a court could not find prosecutorial vindictiveness. The dissenters' inattention to this statement and to the actual facts of this case suggests most careless and frivolous evaluation of the panel opinion.

GINSBURG, RUTH B., *Circuit Judge:* I concur in Judge Edwards' statement and add a few comments, in which Judge Edwards joins, about one of the three cases that will not be reheard.

To demonstrate the *Martin v. D.C. Metropolitan Police Department,* 812 F.2d 1425 (D.C. Cir. 1987), warrants en banc attention, our dissenting colleagues indulge in much "make believe" about that case and the precedent it applies, *Hobson v. Wilson,* 737 F.2d 1 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985). We note some glaring omissions:

1. In the *Hobson* case itself, discovery was not at issue on appeal, for it had long since been completed.

2. *Hobson* acknowledged the existence of cases in which "plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage," and therefore cautioned against "overly rigid application" of the pleading rule the case announced in dictum. *Hobson,* 737 F.2d at 30-31.

3. In *Martin* a highly competent district judge, diligently endeavoring to apply *Hobson* to a different case and setting, did not find it at all "plain" or "clear" that *Hobson* installed an altogether rigid, entirely automatic approach; indeed, the district judge ruled in Martin's favor and allowed him to proceed to uncircumscribed discovery.

4. The appellate panel in *Martin,* applying *Hobson* as the author of that opinion comprehended the precedent, cut back allowable discovery severely, permitting only a sharply limited, precisely defined line of inquiry, and even then, only because of special exigencies in the particular case.

5. The *Martin* panel announced this bottom line: "If, after the limited discovery we have specified, [Martin] has not presented an amended complaint containing 'nonconclusory allegations of evidence of

[unconstitutional] intent,' . . . his constitutional tort claims *must be dismissed." Martin,* 812 F.2d at 1438 (emphasis added).

Only by "sweeping all the chessmen off the table" can one find, as the dissenters purport to do, "square conflict between [*Martin*] and *Hobson,"* an open door for discovery, grace à *Martin,* with respect to "any complaint" alleging unconstitutional motive, or no utility in a motion to dismiss such a case after *Martin. See* Hand, *Mr. Justice Cardozo,* 52 HARV. L. REV. 361, 362 (1939) ("He never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table."). Sensibly read and applied, *Martin* should arm, not disarm, the government in opposing baseless lawsuits. At the same time, *Martin* coupled with *Hobson* should inhibit precipitous dismissal of genuinely meritorious claims.

SILBERMAN, *Circuit Judge,* concurring in the denials of rehearing *en banc:* As should be apparent, some change in the court's thinking concerning the desirability of *en bancs* has taken place. We have now vacated *en banc* orders in four cases—the three we deal with today and *Mississippi Industries v. FERC,* 808 F.2d 1525 (D.C. Cir. 1987) in which the *en banc* order was vacated and the panel agreed to adopt the dissent. *See* Orders of June 24, 1987.[1] I am one who, upon reflection, has reconsidered his views and am now inclined to favor *en bancs* only in cases of exceptional importance *to this Circuit.* For instance, a case that permitted us to resolve a substantial conflict within our own precedents or address an issue with an unusually significant impact on the work of the Circuit would be the type that warrants the institutional costs of a time consuming and unwieldy *en banc* resolution. When the Supreme Court is likely to grant certiorari to decide an issue of national import, *en banc* treatment may be superfluous unless the panel opinion[s] failed to discuss a major issue.

Given the increasing number of cases designated for *en banc* rehearing and the considerable strain those cases place, directly and indirectly, on the functioning of the court, I see nothing unusual or improper in the court's reassessment of its *en banc* caseload. Accordingly, I concur in the court's decisions today. I write separately, however, to explain why, in my view, each of the three cases we deal with today is inappropriate for rehearing *en banc.*

JAMES T. MARTIN v. D.C. METROPOLITAN POLICE DEPARTMENT, ET AL., 812 F.2d 1425 (D.C. Cir. 1987)

The dissent believes this case warrants rehearing because directly inconsistent with the portion of *Hobson v. Wilson*

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[1] Judge Starr apparently does not object to our reconsideration of that case.

entitled "*Pleading Unconstitutional Motive,*" 737 F.2d 1, 29-31 (D.C. Cir. 1984). But as the majority opinion diplomatically implied, *see Martin*, 812 F.2d at 1436 n.22, virtually that entire section of *Hobson* was dicta. Since in *Hobson* the panel did not doubt that the complaint met the *Harlow* standard of sufficient specificity, *see Hobson,* 737 F.2d at 31, the discussion of the outer boundaries of that requirement—particularly as it related to discovery—was unnecessary to the decision. It is not surprising therefore that two of the *Hobson* panel members, sitting again in *Martin*, so vigorously dispute the meaning of the prospective rule announced in *Hobson*. Be that as it may, I do not think the *holding* in *Hobson* is even arguably inconsistent with *Martin*.

Moreover, I read the *Martin* panel opinion as its author does, as limited to the "special exigencies" in this case. I take the opinion to hold that plaintiff is entitled to limited discovery as to what occurred at the November 29th meeting, despite plaintiff's failure to allege direct evidence of unconstitutional motive, because our previous opinions had not been totally clear on the pretrial development of limited immunity cases. *See Martin,* 812 F.2d at 1436. Presumably the next plaintiff will not receive such leeway.

U.S.A v. CHRISTINE MEYER, ET AL., 810 F.2d 1242 (D.C. Cir. 1987)

This case lacks, in my view, the broad significance the dissent attaches to it. The district court found actual vindictive prosecution and the Supreme Court in *United States v. Goodwin,* 457 U.S. 368 (1982), has acknowledged that such a finding is possible even in a pre-trial setting. *See id.* at 380-81. The panel opinion, however, did not actually affirm the district court's finding. After discussing the limited scope of review of that finding (clearly erroneous), *see Meyer*, 810 F.2d at 1244-45, it concluded that *under the facts presented* a presumption of vindictive prosecution should apply. The opinion could well be read as holding only that the district court legitimately

drew inferences from the facts to make its finding that the government engaged in vindictive prosecution. That the government increased the charge and potential penalty for those who insisted on the right to trial still does not, by itself, permit a finding of vindictive prosecution—with or without a presumption. The key (and unusual) additional fact here is that after the government "upped the ante' and defendants asked for the jury trial to which they were entitled on the graver charge, the government reversed course and moved to dismiss the additional charge so as to avoid the jury. I doubt that kind of unseemly prosecutorial maneuvering is common and therefore believe the impact of the majority opinion is quite limited.

I think the dissent exaggerates by accusing the panel opinion of undercutting the Supreme Court's statement in *Bordenkircher v. Hayes.* 434 U.S. 375 (1978), that "[I]n the give-and-take of plea bargaining there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363. Here, unlike in *Bordenkircher,* the defendants (at least some of them) were *not* warned that if they refused to plead guilty they might face additional charges.

The remedy chosen by the district court is in this case, I admit, somewhat dubious. But I am unwilling to conclude, as apparently do the dissenters, that no matter how badly the government behaves in increasing the charge against a defendant, the district court may not dismiss the whole case, but is instead limited to excising only the additional charge. *Cf. United States v. Omni Int'l Corp.,* 634 F. Supp. 1414, 1436-40 (D. Md. 1986).

MARY BARTLETT v. BOWEN, SECRETARY OF HHS,
816 F.2d 695 (D.C. Cir. 1987)

It took the panel over a year to produce the majority and dissenting opinions. In the process both authors, like World War I armies scrambling sideways to the channel,

covered a good deal of ground. The majority's constitutional holding is, of course, dicta, but I do not deny the case's importance because the majority's perception of the constitutional issue governs its interpretation of the statute. Furthermore, were I forced to choose, I would be inclined to favor the dissent's analysis. I think it likely, however, that the Supreme Court will grant certiorari (if the government seeks it) and I seriously doubt that *en banc* treatment will add much to the panel's discussion of the issues and its review of what is, in truth, somewhat puzzling Supreme Court precedent. The question will surely eventually be resolved by the Supreme Court and, in the meantime, I doubt very much whether the work of this court will be seriously affected by our refusal to rehear the case.

BORK, STARR, BUCKLEY, WILLIAMS, and D. H. GINSBURG, *Circuit Judges, dissenting from vacatur of the orders and from denials of rehearing en banc in Nos. 85-6169, 85-6071/72, and 85-5233*: After full deliberation, the court voted to vacate the panel opinions in these cases and to rehear the cases en banc. Now the court vacates the prior orders in each of the three cases, denies the petitions for en banc rehearing, and reinstates all three panel opinions.

It is apparent that each of the cases today removed from our rehearing docket deserves en banc reconsideration. Each involves an issue of exceptional importance and, as we demonstrate below, each received a panel resolution that we think is clearly wrong, and is, at the very least, highly dubious. The discussions of the first two cases are brief because in each there was a full dissent at the panel stage. The reader may find further information about what we think wrong with the panel majorities's decisions in those dissents. Rather fuller treatment is accorded the third case because there was no dissent on the panel.

Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987)

The Medicare Act denies reimbursement for nursing care cost if the applicant, during the same spell of illness, had been reimbursed for the costs of prior nursing care in a Christian Science facility. Appellant Bartlett sued to recover costs denied by the Secretary of the Department of Health and Human Services under this provision. Bartlett maintained that the provision violated the first amendment's guarantee of the free exercise of religion and the equal protection component of the fifth amendment's guarantee of due process. The district court dismissed the complaint for want of subject matter jurisdiction. Only the jurisdictional ruling was before the panel on appeal.

The Medicare Act provides that any individual dissatisfied with the Secretary's determination of benefits is entitled to judicial review. Section 1395ff(b)(2),

however, states that judicial review shall not be available "if the amount in controversy is less than $1000." Bartlett's claim was for $286. The statutory language is flat and contains no hint of any exception for suits asserting a constitutional claim. There is also no hint of any intention to allow an exception of any sort in the legislative history. It is clear, moreover, that the statute's preclusion of judicial review was Congress' assertion of sovereign immunity, a doctrine of American law that is as old as the nation and which is routinely invoked by the Supreme Court to deny jurisdiction over suits against the government for benefits. Sovereign immunity denies jurisdiction over such claims whether their legal basis is constitutional or nonconstitutional.

The panel majority reversed the judgment of the district court, holding that the court had jurisdiction to decide Bartlett's claim on the merits. The opinion said the statute had to be read to contain an exception for claims that depended upon a challenge to a statute's constitutionality. Though, given that statutory interpretation, there was no need to go further, the panel majority went on to give its opinion that Congress could never withhold jurisdiction over a constitutional challenge in both state and federal courts. In doing this, the majority purported to decide the highly controversial question of Congress' power to remove Supreme Court jurisdiction over constitutional challenges under the exceptions clause of article III of the Constitution: "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The majority said that Congress could never take a constitutional issue from all courts.

The upshots of the decision, then, is this.

Despite the clearest statutory language and legislative history to the contrary, and statute precluding judicial review of a benefit claim will be read to contain an exception for a claim that advances a constitutional argument.

This means that the solidly entrenced doctrine of sovereign immunity no longer applies in such cases. The ruling necessarily applies not only to federal sovereign immunity, which is derived from article III, section 2, of the Constitution, but to the sovereign immunities of the several states under the eleventh amendment. *Bartlett* is thus a sweeping and revolutionary decision, quite aside from its gratuitous dicta concerning congressional power over the Supreme Court's jurisdiction. In this circuit, at least, it will have great impact on benefits legislation. Indeed, it will probably draw claimants to litigate here. We find it inconceivable that the case is not worthy of the full court's attention.

Martin v. D.C. Metropolitan Police Department, 812 F.2d 1425 (D.C. Cir. 1987)

The court once deemed this case worthy of rehearing en banc out of concern for its precedential import regarding the issue of what allegations must be pleaded in a complaint in order to prevent dismissal of a tort claim against federal law enforcement officials premised on a claim of unconstitutional motive. Plaintiff-appellee charged officers of the United States Capitol Police with violation of his rights under the fifth amendment to the Constitution. Martin's basic allegation was the defendant officers had conspired to pursue his arrest and indictment in order to divert attention from a police assault upon him in connection with a public demonstration and to deter him from exercising his legal rights.

In *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the court addressed this precise issue and set down clear and exacting pleading requirements:

> [I]n cases involving a claim that defendants acted with an unconstitutional motive, we will require that nonconclusory allegations of evidence of such intent must

> be present in a complaint for litigants to proceed to discovery on the claim.

737 F.2d at 29. The court then went on to state that "plaintiffs must produce some *factual support* for that claim to avert dismissal." *Id.* at 30 (emphasis added).

Despite the clarity of *Hobson*, the panel majority, by failing to dismiss the action, implicitly found the following allegation in the complaint sufficient to preclude dismissal:

> As a result of public and media attention to the unprovoked attack on plaintiff, defendants conspired to develop an unlawful scheme to deflect attention from their actions and to deter plaintiff from seeking to vindicate the violation of his rights.

First Amended Complaint, ¶ 18, J.A. at 26, 31. This cannot possibly be considered to be a "nonconclusory allegation[] of evidence" of unconstitutional intent. Nor is there anything in this allegation which could be called "factual support."

It is plain, therefore, that if *Hobson* had been followed, Martin's complaint would have been dismissed on the pleadings. The panel majority nevertheless rewrote *Hobson* and held that Martin was entitled to "limited discovery." Fairness was said to require this result because "the approach to pretrial development of cases such as this one was far from clear and certain when the district court made its rulings in Martin's favor." 812 F.2d at 1436. The only thing that was not "clear" under *Hobson*, however, was the principle that limited discovery is, as the majority appears to hold, available upon the basis of a complaint that contains absolutely no "nonconclusory allegations of evidence of [unconstitutional] intent" (emphasis added). This option existed only after the majority misread the clear language of *Hobson* to prohibit only "protracted discovery." *Id.* at 1439 (Edwards, J., concurring).

Nor do we understand how the fact that the district court erred in allowing "uncircumscribed discovery," *see id.* at 1436 n.22 changes the analysis. The complaint in this case was insufficent under *Hobson* and should have been dismissed. Alternatively, the court should have remanded with an instruction to grant leave to amend. There is simply no rational support for the option chosen by the majority—permitting appellant on remand to engage in limited discovery on the basis of a clearly insufficient complaint.

Rehearing en banc of the *Martin* decision is thus required because of a square conflict between that decision and *Hobson*. It is also required because the decision, if read by the district court and by litigants as we read it, could render the motion to dismiss useless. If the vague, nonfactual allegations in Martin's complaint are enough to withstand dismissal and to entitle him to discovery, one can hardly imagine any complaint that would not be able to achieve that result. The panel opinion thus has the potential to deprive the government of a needed defense against baseless lawsuits.

Even if our interpretation of *Martin* is not the one that the majority intended, as its author says today it is not, five members of this court so read it. Other courts could reasonably interpret the opinion, as we have, to allow limited discovery on the basis of *any* allegation of unconstitutional motive. Perhaps our reading is wrong; we hope that it is. But if so, then there is an even stronger case for rehearing, *viz.*, so the court could clarify the opinion for the benefit of those who must follow it.

United States v. Meyer, 810 F.2d 1242 (D.C. Cir. 1987)

The Supreme Court has made it clear that the prosecutors' charging decisions are not generally subject to close judicial scrutiny. Notwithstanding this direct Supreme Court authority, a panel of this court has held, to

the contrary, that where a defendant decides to contest an ordinary police citation, and a United States Attorney files an information containing a misdemeanor charge not originally included in the citation, a presumption of prosecutorial vindictiveness arises warranting dismissal of all charges. The panel's decision is clearly inconsistent with *United States v. Goodwin*, 457 U.S. 368 (1982), and may seriously hamper the effective conduct of prosecutions in this circuit.

On April 22, 1985, United States Park Service police issued citations to approximately two hundred political demonstrators outside the White House. Each citation charged a violation of 36 C.F.R. § 50.19 (1985), which makes it a misdemeanor to demonstrate on park grounds without a permit. Most agreed to pay a $50 fine in full satisfaction of the charge, but appellees decided to contest their charge in court. The decision as to the violation to be charged in the citations was made by the Park policemen, who are not lawyers. When the United States Attorney drafted the requisite informations for appellees' separate arraignments, he charged them under section 50.19, and also under a more specific regulation, 36 C.F.R. § 50.30 (1985), which makes it a misdemeanor to obstruct sidewalks. The second charge was added as a part of a "plea offer" to some of the defendants; a number of the defendants accepted this "plea arrangement," but appellees chose to go to trial. *See Meyer*, 810 F.2d at 1244.

Appellees moved to dismiss the information because of prosecutorial vindictiveness. At the hearing on the vindictiveness issue, the government moved to dismiss the second charge. The district court granted the government's motion to dismiss the second charge in the informations, but also dismissed the informations themselves. The district court found "actual vindictiveness" in the government's addition of the section 50.30 charges, which the

court concluded was motivated by a desire to punish appellees for electing to contest their section 50.19 charges in court.

The panel declined to reach the district court's finding of actual vindictiveness, but decided instead that a presumption of prosecutorial vindictiveness was warranted. The panel's purported authority for applying such a presumption is *Blackledge* v. *Perry*, 417 U.S. 21, 27-29 & n.7 (1974).

Blackledge is inapplicable on its face. In that case a prisoner, Perry, had been convicted of misdemenor assault for an attack on a fellow inmate. He received a six-month sentence from a lower court. Under North Carolina law that court had exclusive jurisdiction for the trial of misdemeanors. State law also provided that anyone convicted of a misdemeanor in that court had a right to trial *de novo* in a higher court. Perry filed a notice of appeal pursuant to that right. After he did so, however, the prosecutor obtained a grand jury indictment charging him with assault with a deadly weapon in connection with the same conduct for which Perry had already been given a six-month sentence. Perry pleaded guilty and received a sentence of five to seven years in prison. On petition for a writ of *habeas corpus*, the Court found a likelihood that the prosecutor had sought Perry's felony conviction to punish him for seeking retrial. The Court concluded that such a likelihood warranted a presumption of prosecutorial vindictiveness.

The panel maintains that *Blackledge* applies in this case. Perry was charged with a felony, however, after he exercised his right to automatic appeal of a conviction for a misdemeanor. The presumption of vindictiveness was thus applied in a post-trial setting, not to pretrial charging decisions.

In *Goodwin*, however, the Supreme Court refused to adopt a presumption of prosecutorial vindictiveness in the pretrial setting. The Court explicitly distinguished *Blackledge* on this basis, and explained why it did not apply in the pretrial setting. *Goodwin*, 457 U.S. at 369-70, 383-84. There the prosecutor added a felony charge against the defendant after the defendant had refused to plead guilty to a misdemeanor charge. Holding that the "prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution," *id.* at 382, the Court refused to hold that this conduct warranted a presumption of vindictiveness. "The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness is certainly not warranted." *Id.* at 384 (emphasis in original).

In this case, the panel refused to follow *Goodwin* and instead applied a presumption of vindictiveness in circumstances indistinguishable from *Goodwin*. The issues raised by that decision are of great importance. Unless the Supreme Court decides to correct our error by writ of certiorari, prosecutors in this circuit will know that if they add just one charge to those made at the time of arrest, they risk dismissal of their entire case. *Cf. Meyer*, 810 F.2d at 1249 ("The deterrent effect of the rule will remain even if judges resort to this remedy only in a minority of cases."). This result severly limits the prosecutor's discretion about how best to bring charges and to conduct plea negotiations. It ignores the Supreme Court's recognition of "the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his constitutional right to stand trial." *Goodwin*, 457 U.S. at 378. And it undercuts the Court's explicit statement that

"in the 'give-and-take' of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Bordenkircher* v. *Hayes,* 434 U.S. 357, 363 (1978). Perhaps most disturbingly, when quelling public disturbances the police will be under pressure to charge those arrested for all possible violations lest it becomes impossible to prosecute them later for any one of them. *Cf. Meyer,* 810 F.2d at 1248 ("Even if our holding were to bind prosecutors to all charging decisions of arresting officers, we think the government would suffer no great loss."). With respect, for us at least the panel's decision speaks against itself

The panel's attempt to distinguish *Goodwin, see Meyer,* 810 F.2d at 1246-47, is unsuccessful. The fact that some defendants pleaded guilty and thus did not receive added charges does not show that the prosecutor "discriminated" among defendants on any other grounds than whether they had pleaded guilty during the plea negotiations; yet the Court in *Goodwin* explicitly held that "changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial 'vindictiveness.' " *Goodwin,* 457 U.S. at 379-80. Nor is it at all clear why the panel should have been willing to presume vindictiveness because of either the simplicity of the facts that underlie the charges or the complexity of the legal arguments that defendants may raise in their defense. *Meyer,* 810 F.2d at 1246-47. Those facts seem utterly irrelevant.

Finally, the other factor that the panel relied on to justify its holding of presumed vindictiveness—the government's conduct after increasing the charges against the defendant—is also unavailing. The panel noted that at the trial court hearing on vindictiveness the government moved to drop the very charges it had recently added against the defendants. The panel's misguided attempt to

infer probable vindictiveness from the fact is demonstrated by the weakness of the inferential chain that it constructs. The withdrawal of charges, like the addition of charges, may occur for a multitude of reasons that all fall within the realm of acceptable prosecutorial discretion—a point that the panel perhaps concedes when it admits that the withdrawal of charges here may have been in good faith, and the prosecutor may have simply changed his mind. The panel speculates, however, that the additional charge may have been withdrawn to avoid the necessity of a jury trial, which the trial judge had granted to the defendants after this charge had been added against them. Yet this flatly ignores the Supreme Court's recognition that this would be a perfectly acceptable motivation for adding or dropping charges: "the prosecutor's interest at the bargaining table," which the Court has found to be a legitimate interest, "is to persuade the defendant to forgo his constitutional right to stand trial." *Goodwin*, 457 U.S. at 378. This is nothing more than the ordinary "give-and-take" of plea bargaining, and here the defendants were entirely "free to accept or reject the prosecution's offer." *Hayes*, 434 U.S. at 363; *see also Goodwin*, 457 U.S. at 380 ("just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded"). Once again, this conduct by the prosecutor does not support any presumption of vindictiveness, though the defendant is of course free to try to prove actual vindictiveness based on such conduct.*

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* No other circuit has repudiated *Goodwin's* holding that no presumption of vindictiveness will apply in the pretrial context. The two cases cited in the panel opinion do not support its result. In United States v. Krezdorn, 718 F.2d 1360 (5th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984), the Fifth Circuit stated that a presumption of vindictiveness would lie when the prosecutor decided "to increase the

In the end, therefore, the Court held in *Goodwin* that judicial interference in prosecutors' charging decisions is to be avoided, even at the risk that a prosecutor's decision to sanction defendants for invoking their right to a jury would go unpunished for want of proof. If the Court reached that judgment in regard to the right to a jury, it is out of the question for us to reach a contrary judgment to protect appellees' right to contest a $50 citation.

An independent problem with the panel's decision in this case, which compounds the unfortunate effects of its holding, is the remedy that it approved. The trial court, which had made a finding of actual vindictiveness, dismissed all the charges against the defendants, even those brought originally and thus not tainted by any allegations of vindictiveness. The panel concedes that this is an "extreme" remedy, and is unable to point to any prior cases in which it had been imposed. *Meyer*, 810 F.2d at 1249. There is good reason for this want of authority. We do not lightly presume that prosecutors act in bad faith when they exercise the considerable powers that society has vested in them to enforce the laws. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *Goodwin*, 457 U.S. at 382. Thus, the proper remedy for prosecutorial vindictiveness is removal of the illegality. The question is not whether "the prosecutor will have nothing to lose by acting vindictively," *Meyer*, 810 F.2d at 1249, but merely

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number or severity of charges following a successful appeal." *Id.* at 1365. That is not a pretrial decision; it penalizes a defendant for appealing from a conviction, which is what the Supreme Court held unacceptable in *Blackledge*. And in United States v. Gallegos-Curiel, 681 F.2d 1164 (9th Cir. 1982), the court's suggestion that a presumption of vindictiveness might lie in certain extreme circumstances, *see id.* at 1168-69, was pure dictum since no such presumption was found to be appropriate in that case.

ensuring that the prosecutor will have nothing to *gain* by acting vindictively. The strong political checks on prosecutorial conduct will ensure that he has something to lose by acting unjustifiably. An extreme remedy such as the one in this case, however, would mean that society has lost its ability to prosecute an individual on what are understood by all to be legitimate charges. If there was any actual vindictiveness in this case, it was cured when the additional charges against the defendants were dropped.

In sum, the panel's holding in this case is an unjustified departure from controlling Supreme Court precedent. It represents a view of the plea-bargaining process that is sharply different from the more realistic view taken by the Supreme Court. if allowed to stand, it will significantly hamper prosecutors in this circuit from exercising their discretion in ways the Court has recognized as legitimate.

For the reasons set forth, we dissent from the denials of rehearing en banc.

STARR, *Circuit Judge,* dissenting from vacatur of the orders in Nos. 85-6169, 85-6071/72, 85-5233: At the Founding, the Framers of our system of government envisioned that Article III courts would be institutions where judgment, not will, was exercised. We in the judiciary are thus to be quite unlike the political branches as we carry out what Justice Frankfurter aptly described as a calling with sacerdotal qualities.

Whether a particular exercise of judicial judgment is sound or not is itself, I recognize, peculiarly a matter of judgment. There is apt to be no incontestably "right" answer if the issue is truly one entrusted to the exercise of a court's judgment. What is right and meet will depend in large measure upon one's conception of what is appropriate and proper under the circumstances.

And thus I relate what is nothing other than my own perception of what has occurred today. My judgment may well be dismissed as idiosyncratic or simply outmoded in the contemporary world of an overburdened and expanding judiciary. But, in my view, it is destabilizing and unseemly for courts, which should be solid rocks in a world filled with rolling stones, to lurch suddenly from one course to another. To be sure, courts enjoy the sheer power to make 180 degree turns in judgment. But my concerns go beyond the issue of power.

So too, I recognize that some will say that corrections of a "mistake," albeit one thrice committed in breathtakingly short order, is but a symbol of an institution's wisdom and maturation. But it is, in my judgment, unwise to tear asunder in one mighty blow that which was duly considered and decided upon after careful reflection by the full court. It is quite unlikely that a "mistake," which obviously could infect the exercise of judgment as to one case, would suddenly spread with prairie-fire speed to consume three cases of significance.

I am persuaded that we have today contributed to a regrettable aura and reality of instability and confusion. This is all the more to be lamented in a court blessed with our rich tradition and history, including a heritage in the highest traditions of bench and bar of lively disagreement.

We should stay the course in all three cases.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIMINAL NOS. 85-329, 85-330, 85-331

UNITED STATES OF AMERICA

v.

THERESA FITZGIBBON, ET AL., DEFENDANTS

Washington, D.C.

September 11, 1985

The above-entitled matter came on for trial before the Honorable Aubrey E. Robinson, Jr., Chief Judge, at 9:45 a.m.

Appearances:

ROBERT MCDANIEL, AUSA
FOR THE GOVERNMENT

DANIEL ELLENBOGEN, ESQ.
SEBASTIAN GRABER, ESQ.
FOR THE DEFENDANTS

DAWN T. COPELAND
OFFICIAL COURT REPORTER

PROCEEDINGS

The Deputy Clerk: United States of America v. Theresa Fitzgibon, et al. Criminal Nos. 85-329, 85-330. Criminal No. 85-331.

Mr. Robert McDaniel for the government and Mr. Daniel Ellenbogen and Sebastian Graber for the defendants.

* * * * *

The Court: It is my view that Goodwin does not control this case on the facts that we know.

Goodwin, as lawyers know who have read this case, was a situation in which the misdemeanor charges were brought. There was discussion and the prosecutor said, look, cop to these pleas or something big and bad can happen to you.

In essence that is what he was told. The defendant says, no.

The prosecutor said, fine. He got a grand jury indictment, felonies arising out of the same basic information, and the court of appeals didn't like it and the supreme court said, no, that is quite all right, because it was in the context of a give and take between the prosecutor and the defendant and the defendant had made his election knowing that he faced stiffer charges down the way, which was his right to do no matter what the prosecutor thought about it or the inconvenience that it was going to put to the government.

These case all have to depend upon the facts and it is uncontradicted on this record that having been arrested, every one of these defendants knew exactly what he was arrested for.

They show up for an arraignment and have to respond to an information involving two counts.

There was no notice, formal, informal, to the individual pro se defendants or through counsel that the possibility existed that if they didn't post the collateral or forfeit the collateral, they were going to be subjected to additional charges whether or not they arose out of that incident or anything else that the government chose legitimately to bring against them which is an entirely different situation.

The initial charge, a petty misdemeanor, the minimum possibility of a fine or incarceration suddenly blossoms into the possibility of a $1,000 fine and a year in jail absolutely out of the blue, so to speak, with no additional reasons that could have possibly been conjured up or in fact were offered by the government, although the government is not obligated, necessarily, to tell you its reasons, but there has to be some basis for it which changes the situation.

Goodwin clearly indicates to this court that whatever the basis for the change in the government's position, some knowledge and information has to be given to an individual defendant so that she or he can make the determination or election whether they want to face the additional charges.

No such opportunity was ever afforded any one of the defendants presently charged through counsel, through notice, or anything else. You elect not to forfeit and you tell the government we want to go to trial and the government says, fine. We are going to arraign you but on what?

On a two-count information and the fact that the government contends, and I don't dispute the government's contention because the offer has been made in open court and the fact that the government is still willing for you to forfeit the $50 and go about your business doesn't change the picture one iota as far as the legal status in which the government finds itself and which you find yourselves.

To this court, what the court of appeals will think about it, I don't know, but to this court it's a clear indication that in the exercise of your right to have a jury trial, the government upped the ante, as far as the government is concerned, with no notice, no consultation, with no opportunity for you to make an election.

I think that is a violation of your due process rights and I dismiss the information as to all defendants.

Mr. Ellenbogen: Thank you, your honor.

(Whereupon, the hearing was concluded.)

CERTIFICATE OF REPORTER

This record is certified by the undersigned to be the offical transcript of the above-entitled hearing.

/s/ DAWN T. COPELAND

OFFICIAL COURT REPORTER

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIMINALS NOS. 85-0329, 85-0330, 85-0331

UNITED STATES OF AMERICA

v.

THERESA FITZGIBBON, ET AL.

[Nov. 12, 1985]

MEMORANDUM AND ORDER

On September 11, 1985, this Court dismissed the information in the above captioned cases on the basis of vindictive prosecution. Before the Court is the government's Motion for Reconsideration. For the reasons discussed below, this motion shall be denied.

On April 22, 1985, Defendants in these combined cases were arrested with other individuals by United States Park Police. At that time, each arrestee was released with a Park Police Citation Form for "Demonstrating Without a Permit." The reactions of the arrestees to the citation varied—some paid a $50.00 fine in full satisfaction of the citation and without the necessity of a court appearance. Others ignored the citation. The defendants in these cases decided to proceed to trial. It was after this decision that the government filed a two-count misdemeanor information against only these defendants alleging the commission of two offenses: obstructing sidewalks adjacent to the White House, 36 U.S.C. 50.30; and demonstrating without a permit, 36 C.F.R. 50.19. Defendants were arraigned on these charges, each carrying a maximum penalty of six (6) months in prison and a $500.00 fine.

The government contends that its decision as to which charges to bring and in what form to bring them was a legitimate exercise of prosecutorial discretion. Although the government is correct that when it increases the charges against a defendant before trial there is no presumption of vindictiveness (unlike in post-trial situations) the Supreme Court did "not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *United States v. Goodwin*, 457 U.S. 368, 384 (1982).

Most of the cases cited by the government in support of its Motion for Reconsideration concern situations where the government increased charges against a defendant after unsuccessful plea negotiations. For example, in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the defendant rejected a misdemeanor plea offer and was subsequently indicted on a series of felony charges. Central to the Court's finding of no vindictiveness in these cases was the Court's finding that the defendant was "fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty," the Court stated. *Id.* at 360. *See also, United States v. CFW Construction Co., Inc.*, 583 F.Supp. 197 (D.S.C. 1984) ("The defendant was in an equal bargaining position with the Government, and was free to accept or reject the proposed plea agreement." *Id.* at 208).

It is without question that the Supreme Court has accepted plea negotiation as a legitimate process. Defendants here are not attacking their opportunity to pay $50.00

in satisfaction of the original Park Citation instead of going to trial. Defendants' claim of vindictive prosecution stems from the increase in the charges against them *without warning* once they decided to exercise their right to a trial.

The government cites *United States v. Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. 1982). That case is inapposite here. In *Gallegas-Curiel*, "[t]he prosecutor . . . was motivated in part by additional information and in part by his reevaluation of the seriousness of appellant's immigration record" when he decided to bring felony charges. *Id.* at 1170 (citation omitted). The record is clear that the government in this case discovered no new information between the time of the original citation and its decision to bring another charge against only those defendants who opted to go to trial. On September 11, 1985, the Court found that it was merely Defendants' decision to go to trial which prompted the government to bring this additional charge and dismissed the case on the basis of vindictive prosecution. That decision shall stand.

For the foregoing reasons, it is by the Court this 12th day of November, 1985.

ORDERED, that the government's Motion for Reconsideration is DENIED.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
Chief Judge

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE MEYER, ET AL.

No. 85-6171

UNITED STATES OF AMERICA, APPELLANT

v.

THERESA FITZGIBBON, ET AL.

No. 85-6172

UNITED STATES OF AMERICA, APPELLANT

v.

VIRGINIA SENDERS, ET AL.

Appeals from the United States District Court
for the District of Columbia
(Criminal Nos. 85-00329-01, 85-00330-01
and 85-00331-01)

[Filed Feb. 13, 1987]

JUDGMENT

Before: WALD, *Chief Judge*, MIKVA, *Circuit Judge*, and LEIGHTON,* *Senior District Judge*.

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date ebruary 13, 1987
Opinion for the Court filed by Circuit Judge Mikva.
[*]Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX F

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA

v.

CHRISTINE MEYER, ET AL.

AND CONSOLIDATED CASES 85-6171 AND 85-6172

CR No. 85-00329-01

[Filed Apr. 30, 1987]

ORDER

Before: WALD, *Chief Judge,* MIKVA, *Circuit Judge,* and LEIGHTON,* *Senior District Judge, U.S. District Court for the Northern District of Illinois*

Upon consideration of appellant's petition for rehearing, filed March 30, 1987, it is

ORDERED, by the court, that the petition is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. Section 294(d).

APPENDIX G

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA

v.

CHRISTINE MEYER, ET AL.

AND CONSOLIDATED CASES 85-6171 AND 85-6172

CR No. 85-00329-01

[Filed Apr. 30, 1987]

ORDER

Before: WALD, *Chief Judge*, ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, *Circuit Judges*

Appellant's suggestion for rehearing *en banc* has been circulated to the full court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the court *en banc*, that appellant's suggestion for rehearing *en banc* is granted and it is

FURTHER ORDERED, by the court *en banc*, that the opinion and judgment of February 13, 1987 be, and the same hereby are, vacated.

A future order will govern further proceedings herein.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX H

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA

v.

CHRISTINE MEYER, ET AL.

AND CONSOLIDATED CASES 85-6171 AND 85-6172

CR No. 85-00329-01

[Filed Jul. 31, 1987]

ORDER

Before: WALD, *Chief Judge,* MIKVA, *Circuit Judge,* and LEIGHTON,* *Senior District Judge, U.S. District Court for the Northern District of Illinois*

Upon consideration of appellant's petition for rehearing, filed March 30, 1987, it is

ORDERED, by the court, that the petition is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. Section 294(d).

APPENDIX I

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE MEYER, ET AL.

No. 85-6171

UNITED STATES OF AMERICA, APPELLANT

v.

THERESA FITZGIBBON

No. 85-6172

UNITED STATES OF AMERICA, APPELLANT

v.

VIRGINIA SENDERS

Criminal No. 85-00329-01, 85-00330-01, 85-00331-01

[Filed Jan. 24, 1986]

ORDER

On consideration of appellant's motion to consolidate Nos. 85-6169, 85-6171 and 85-6172, it is

ORDERED that the aforementioned motion is granted and the above captioned cases are consolidated. It is

FURTHER ORDERED that a briefing schedule is set as follows:

Appellant's brief and appendix (or Gen. Rule 17(c) transcripts)	—Feb. 28, 1986,
Appellees' brief(s)	—Mar. 31, 1986,
Appellant's reply brief, if any	—Apr. 14, 1986.

For the Court:
GEORGE A. FISHER, Clerk

By: /s/ CARMEN A. BORZA
Carmen A. Borza
Deputy Clerk
(535-3302)

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/60038

ORIGINAL

No. 87-730

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTINE MEYER, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JAMES F. HIBEY
SHERRY A. QUIRK
(Counsel of Record)
FRANCES C. DeLAURENTIS

Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
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Suite 1000
Washington, D.C. 20036

Counsel for Judith Hand

December 31, 1987

27 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in applying a presumption of vindictiveness in the pretrial context when the facts overwhelmingly demonstrated a realistic likelihood of prosecutorial misconduct.
2. Whether a district court's dismissal of the remaining charge in a vindictive prosecution case constitutes an abuse of discretion where, due to the prosecutor's conduct, such dismissal is the only remedy available to the court.

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TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87-730

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTINE MEYER, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Judith Hand, respondent in this proceeding, respectfully requests that the Court deny the United States' petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

SUMMARY OF ARGUMENT

The government has wholly failed to justify the grant of certiorari in this case. It exaggerates the reach of the appellate court's holding to create the illusion that the Court of Appeals' decision is inconsistent with this Court's precedents. The government fears that its misconduct here has sparked district and appellate court decisions that threaten its pretrial charging authority. However, as correctly stated by Circuit Judge Laurence Silberman, the "unseemly prosecutional maneuvering"[1] that occurred here fortunately is not common, and the government's fear is groundless with respect to appropriate charging decisions.

The government claims the Court of Appeals disregarded this Court's rulings in several respects. First, it asks the Court to find, under its Goodwin[2] decision, that a presumption of

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1/ Order vacating order granting rehearing en banc, concurring Opinion of Judge Silberman, Appendix ("App.") to Government's Petition ("Pet.") for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, at 35a.

2/ United States v. Goodwin, 457 U.S. 368 (1982).

vindictiveness can never arise in the pretrial setting, no matter how forcefully the facts demonstrate a realistic likelihood of vindictiveness. However, the Court of Appeals correctly rejected this interpretation of Goodwin and found that the facts here demonstrated overwhelmingly the likelihood of prosecutorial retaliation. Second, the government argues that this Court should find that the punitive addition of a charge is acceptable as plea bargaining. Yet, even the government concedes that no plea bargaining occurred in this case. Third, the government asks this Court to find that the remedy fashioned by the Court of Appeals is dangerously overbroad and suggests instead that this Court ignore the misconduct found here. The Court of Appeals correctly found that the remedy, though extreme, was not an abuse of discretion, given the egregious facts of this case. Finally, the government asks this Court to overlook the due process violation that occurred in the instant case and instead to advance the government's apparent interest in controlling unruly demonstrators who opt to go to trial. The government's portrait of the chaos this case will create is fallacious and, in any event, cannot justify the due process violation committed here.

Because the decision of the Court of Appeals is correct, we urge the Court to decline to issue a writ of certiorari. In view of the soundness of the Court of Appeals' decision, the government's request for summary dismissal does not merit a reply.

STATEMENT OF THE CASE

A. Arrest And Charging

On April 22, 1985, Judith Hand was arrested with 195 other individuals by the United States Park Police.[3/] Each arrestee received a Park Police Citation Form which described the alleged violation as "Demonstrating Without A Permit." Such a violation

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3/ Ms. Hand joined with other demonstrators in a rally titled, "Peace, Jobs, and Justice." It is alleged that the arrestees seated themselves in the driveway of the White House, sparking the revocation of their permit and giving rise to a charge of a violation of 36 CFR § 50.19 (1985).

carries a maximum penalty of six months in jail and a $500 fine. The Citation Form provided Judith Hand and the other demonstrators with two options: forfeit $50 in collateral, in full satisfaction of the charge and without necessity for a court appearance, or proceed to trial on the charge.

In light of these options, some demonstrators elected to forfeit collateral; some did not respond at all. Ms. Hand, with certain other arrestees, decided to challenge the basis for her arrest and chose to go to trial on the charge.

B. Post-Arrest

A May 15, 1985 arraignment was scheduled. Tr. 15.4/ However, the notices were sent to defendants only several days before the scheduled date; and consequently, none of the defendants appeared. Id. The prosecutor had not prepared the criminal informations, and there was no discussion of the charge. Id.; Tr. 46. However, counsel for defendants did inform the Assistant U.S. Attorney that defendants (also referred to herein as "respondents") had elected to go to trial. Tr. 15-16; Tr. 46. Due to the large number of defendants, arraignments were scheduled for three days -- May 28, June 21, and June 27. Tr. 15.

Aside from this meeting, it is undisputed that defendants and their counsel had no contact with the prosecutor from the date of arrest to the first arraignment date. Tr. 46-47.

C. Arraignment

1. May 28 Arraignment

After learning that the defendants intended to go to trial, the government added a second charge, obstructing the sidewalks adjacent to the White House in violation of 36 C.F.R. § 50.30 (1985), against only those defendants, including Judith Hand, who chose to go to trial. The obstruction charge also carries a

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4/ All transcript references ("tr.") are to the transcript for the September 11, 1987 hearing. A copy of the transcript is attached to the brief in opposition filed by Sebastian Graber, Esq., on behalf of a number of respondents, on December 31, 1987.

maximum penalty of six months' imprisonment and a $500 fine, thus raising the defendants' exposure substantially to a maximum of one year in prison and a $1,000 fine.

At this first day of arraignments, the charges were never read to defendants; and the defendants were made aware of the added charge only after they informally entered their pleas of not guilty . Tr. 15; Tr. 42. No plea offer was made to these defendants at any time, formally or informally. Tr. 42.

2. June 21 And 27 Arraignments

The defendants arraigned on these dates also were subject to the additional charge. However, an informal offer was made by the prosecutor to drop one charge in return for pleading no contest to the other. Tr. 34, 42. This plea offer was explicitly held open only for the day of arraignment. A number of defendants chose this option, and they were sentenced to terms of unsupervised probation. Pet. at 3. Many, however, pled not guilty and requested trial and thus faced the original and added charge. Id. Many of these individuals expressed the desire to appear pro se.

D. Pre-Trial Motions And Disposition

On July 30, 1985, counsel for defendants moved to dismiss the informations, alleging vindictive prosecution. On the basis of the additional charge, counsel also requested a jury trial.

Chief Judge Aubrey Robinson granted the motion for a jury trial and found that serious questions had been raised about prosecutorial vindictiveness that warranted further exploration. He scheduled the motion to dismiss for argument on the trial date, September 11, 1985.

E. September 11 Hearing

Chief Judge Robinson began the hearing by granting the Assistant U.S. Attorney's motion to dismiss the charge which had been added after defendants requested trial. Tr. 3. The undisputed effect and intent of the government's dismissal was to deprive the defendants of their right to a jury trial. Pet. at 3.

The court then heard argument on the issue of vindictive prosecution and found the facts as follows. The defendants were arrested en masse for one violation and were given the option of forfeiting collateral or going to trial on that violation. Tr. 27. However, those who opted to go to trial suddenly faced not one, but two violations, and the only motivation for the second charge was the defendants' decision to go to trial. Id. The circumstances giving rise to the arrest had not changed -- i.e., no new information justified the addition of a second charge. Id.[5/] To the Chief Judge, it was clear that the prosecutor's motivation was improper.

Chief Judge Robinson established that no contact occurred between the government and the defendants between arrest and arraignment. Tr. 45-47. Thus, there was no notice that an additional charge would be brought. Id. Chief Judge Robinson emphatically rejected the notion argued by the prosecutor that the additional charge was justified by the occurrence of plea bargaining and found that plea bargaining cannot occur when one side does not know about the plea. Tr. 33. He found the U.S. Attorney's argument that the added charge resulted from an analysis of the societal interest in the prosecution to be incredible, in the absence of new facts to support such an analysis. Tr. 49.

Chief Judge Robinson ruled that the finding in Goodwin that no presumption of vindictiveness was appropriate in the facts presented there, did not control the case before him. Tr. 47-48. He concluded that the undisputed evidence provided a "clear indication" that the government improperly "upped the ante . . . with no notice, no consultation, with no opportunity for you to make an election." Tr. 50. Consequently, the Chief Judge dismissed the informations. Id.

5/ See Pet. at 4 n. 3.

F. Motion For Reconsideration And Disposition

The government, by written motion, asked Chief Judge Robinson to reconsider his oral ruling. He denied the government's motion and held that Goodwin does not completely foreclose a finding of vindictiveness based on objective evidence in the pretrial setting. App. at 56a. He affirmed his conclusion that the sole basis for the additional charge was defendants' decision to go to trial and reiterated his finding of improper prosecutorial motivation. App. at 57a.

G. Court of Appeals Decision

On appeal, this case came before Chief Judge Patricia Wald, Judge Abner Mikva, and Judge Charles Leighton (sitting by designation) for argument. While declining to reach the question whether the government had displayed actual vindictiveness, the Court of Appeals found that the defendants had presented sufficient evidence to justify a presumption of vindictiveness. It further found that the government had failed to present evidence to "erase" such a finding. App. at 6a.

The Court of Appeals rejected as "unpersuasive" the government's argument that this Court's Goodwin decision stands for the proposition that a presumption of vindictiveness can never arise pretrial. App. at 7a. The Court of Appeals interpreted Goodwin to establish that "proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not alone give rise to a presumption in the pretrial context," because this sequence of events does not present a realistic likelihood of vindictiveness. Id. The Court of Appeals focused its inquiry on the issue framed by Goodwin and subsequent cases: whether the circumstances as a whole present a realistic likelihood of vindictiveness. App. at 7a-8a.

The Court of Appeals determined that the facts of this case combined to suggest retaliatory motivation. App. at 8a. Most compelling among these facts was the extreme and inexplicable discrepancy in treatment between those who chose to go to trial and those who forfeited collateral, when the facts underlying the

charging decision against both sets of defendants were identical. Id. This discrepancy, the Court found, gave rise to the suspicion that defendants received different treatment because of their differing decisions on a trial. Id.

The Court of Appeals also found that the "simplicity and clarity of both the facts and law . ... heighten[ed]" the suspicion of retaliation. App. 9a. It observed that officials frequently must make charging decisions with "incomplete information or understanding." Id. However, this case presented no such problem of understanding and analysis. Id.

The Court's suspicion of retaliation was confirmed by the government's decision to drop the added charge when the charge inconveniently gave rise to the right to a jury trial. Id. This course of conduct demonstrated to the appellate court a "disturbing willingness to toy with the defendants" that the district court could properly take into account in assessing the likelihood of retaliation. App. at 9a-10a.

The appellate court also noted that a number of factors in this case combined to give rise to a strong motivation for the government to act vindictively. App. at 10a. A large group of defendants charged with "petty offenses," many of whom intended to proceed pro se, raising First Amendment claims, threatened to force the government to participate in a drawn-out legal proceeding. Id. The government would be strongly tempted to seek to punish the defendants who caused this burden. Id.

The Court of Appeals rejected he argument that the apparently retaliatory motivation for the increase in charges was vitiated by the fact that the prosecution had added a charge in the "routine" course of review. App. at 11a. The appellate court emphasized that the presumption of vindictiveness does not hinge upon the continued involvement of any individual but, rather, refers to the "conduct of the government as a whole." Id. For the same reason, the Court of Appeals found the fact that the first charge was made by a non-lawyer to be irrelevant. Id. "To do otherwise," it stated, "would be to ignore that the

decision to punish defendants . . . arises more often from institutional than from personal wellsprings." Id.

The Court of Appeals rejected the government's argument that a failure to reverse the District Court would hamper the functioning of the magistrates' citation system. App. at 12a. In so holding, the appellate court noted the following facts: the government is bound to charging decisions made at arrest in the absence of a request for trial; the application of the pre-trial presumption of vindictiveness is limited; the government possesses the ability to rebut the presumption; and the government is able to legitimize its conduct by providing notice of the possibility of enhancement of charges upon request for a trial. App. at 12a-13a.

With respect to the remedy, the Court of Appeals found that the district court's dismissal of the remaining charge based upon the particular facts of the case at hand did not constitute an abuse of discretion. In rejecting the government's argument that a court, when confronted with prosecutorial vindictiveness, has authority only to dismiss the additional "tainted" charge, the Court of Appeals found that neither case law nor reason supported such a broad limitation on the remedial authority of district courts in cases marked by prosecutorial vindictiveness. App. at 14a. Rather, the Court of Appeals found that "[t]he government's position, if accepted, would remove the deterrent effect of the doctrine of prosecutorial vindictiveness -- a doctrine which the Supreme Court designed to be largely prophylactic in nature." Id.; citation omitted. In concluding, the Court of Appeals noted that the remedy imposed was extreme and counselled against the routine imposition of this broad remedy; however, the Court of Appeals refused to find that the district court judge acted impermissibly given the undisputed and particular facts of this case. App. at 15a.

REASONS FOR DENYING THE WRIT

1. a. The government contends that the Court of Appeals' decision in this case disregards this Court's holding in Goodwin,

where, according to the government, this Court held that a presumption of vindictiveness "should not be applied in the pretrial stage at all," due to "circumstances common to the pretrial stage of all cases." Pet. at 9. The government faults the Court of Appeals for looking to the facts of this case, which clearly distinguish it from Goodwin and present a realistic likelihood of vindictiveness.

In Goodwin, as the government concedes and as the Court of Appeals correctly found, this Court focused on the "'mere fact'" that the defendants refused to plead guilty and the prosecutor subsequently added a charge. Pet. at 8. No other evidence of vindictiveness was presented. 457 U.S. 380-81.[6/] This sequence of events, this Court found, did not warrant the application of a presumption because it is unlikely that a prosecutor would respond to a jury trial demand by bringing charges solely as a punishment to the defendant's assertion of this right. 457 U.S. at 384. This Court speculated, in the absence of record evidence, that new information might have shaped the prosecutor's charging decision or that the prosecutor's legal theories may not have crystallized. 457 U.S. at 381. The Goodwin Court also determined that the defendant's demand for a jury trial did not support establishment of a presumption, because the government must put on its case whether before a judge or a jury and thus had the same "stake" in the proceeding. 457 U.S. at 383. To arrive at this conclusion, the Court thus looked to the factual setting of that case.

The Court of Appeals in the instant case properly interpreted Goodwin to hold that a pretrial demand for a jury trial, followed by a prosecutorial increase in charges, does not alone give rise to a presumption because a realistic likelihood of vindictiveness cannot be found to exist in such circumstances. However, according to the Court of Appeals, this Court in Goodwin did not "adopt a per se rule that in the pretrial context no

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6/ Indeed, only evidence to rebut vindictiveness was introduced in Goodwin. 457 U.S. at 371 n.2.

presumption of vindictiveness will ever lie." App. at 7a. It correctly interpreted Goodwin to require examination of the circumstances of the case to determine whether a realistic likelihood of vindictiveness existed.

The cases cited by the government as inconsistent with the Court of Appeal's interpretation of Goodwin (Pet. at 8) in fact reinforce this analysis and belie the government's position. Thigpen v. Roberts, 468 U.S. 27, 30 n.4 (1984); United States v. Oliver, 787 F.2d 124, 126 n.1 (3d Cir. 1986); United States v. Martinez, 785 F.2d 663, 668-69 (9th Cir. 1986); Wasman v. United States, 468 U.S. 559, 568 (1984); and United States v. Gallegos-Curiel, 681 F.2d 1164 (9th Cir. 1982) all interpret Goodwin as did the Court of Appeals in this case: the application of a presumption of vindictiveness depends upon the facts of the case -- i.e., on the presence of a realistic likelihood of vindictiveness -- and no such likelihood is presented solely by the enhancement of charges following a jury trial demand. Indeed, Martinez and Gallegos-Curiel implicitly recognize that a pretrial presumption of vindictiveness can arise when a realistic likelihood of vindictiveness is established by the facts.7/

b. The government next argues that even if the court of appeals was correct in its interpretation of Goodwin, the distinctions drawn by the appellate court between this case and Goodwin do not support a finding that the prosecutor's charging decision in this case was vindictive. The government's argument asks this Court to ignore the facts of the instant case, facts

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7/ In Gallegos-Curiel, per Kennedy, J., contrary to the government's contention (Pet. at 8), the Ninth Circuit did not hold "the presumption of vindictiveness inapplicable to pretrial charging decisions." What the court of appeals did hold is that a "presumption applies only to the extent it reflects the very real likelihood of actual vindictiveness." 681 F.2d at 1167. The court of appeals found, in certain cases, the addition of charges after indictment would raise a presumption of vindictiveness. 681 F.2d at 1170.

Similarly, Martinez, 785 F.2d at 669, also cited for this proposition, simply notes that retaliation is "far more likely to occur" after an initial prosecution than in the pretrial setting. It does not hold that a presumption of vindictiveness, based upon a realistic likelihood of prosecutorial retaliation, will never apply pretrial.

that Chief Judge Robinson found proved actual vindictiveness and facts that Judge Silberman believed to be suspect and unusual.

First, the government disputes the Court of Appeals' finding that the disparity in treatment accorded to arrestees who pled guilty and those who determined to go to trial demonstrates vindictiveness. The government disingenuously claims it simply reflects the fact that certain defendants opted for a plea offer. In so arguing, the government attempts to rely upon plea bargaining that never occurred and to escape the implications of the initial charging decision in this case.

It is incredible that the government claims that this difference in treatment can be explained by plea bargaining, when the record clearly shows that those who paid $50 had no idea they were accepting a plea bargain and that those who opted for trial had no way of knowing that they faced an additional charge until arraignment.[8/] As Chief Judge Robinson found, there can be no plea bargaining when one side knows nothing of the alleged plea offer. Judge Mikva correctly found that plea bargaining played no part in this disparate treatment. App. at 30a. Accordingly, the addition of a charge cannot be justified on that basis.

In addition, the peculiar character of the initial charging decision in this case underscores the vindictiveness demonstrated by the disparity in treatment between those who forfeited collateral and those who chose trial. As found by the Court of Appeals, the initial charging decision, unlike that in Goodwin and in the vast majority of cases, provided the entire basis for resolution of this case. App. at 12a. Under the magistrate's citation system, a measure of the societal interest in the prosecution was made, and one charge, with a $50 forfeiture of collateral, was provided. Yet, for only those defendants who exercised their right to trial, a second charge was added. The

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8/ As shown in the record, the Assistant U.S. Attorney freely admitted that no communications occurred between himself and the defendants between arrest and arraignment. Tr. 47. It is thus impossible for the government credibly to claim that the second charge resulted from plea bargaining.

stark departure from the initial and binding charging decision gives rise to an overwhelming inference that the second charge was added by the prosecutor to punish the defendants not for the alleged crime they committed, but for the exercise of their right to trial.

Indeed, for that reason, this case is more similar to Thigpen than to Goodwin. In Thigpen, as here, a preliminary proceeding, through the Justice of the Peace Courts, was available to resolve the entire controversy. 468 U.S. at 28 n.2. Those who desired to appeal the outcome of the proceeding were free to do so and were entitled to a trial de novo. Id. The Thigpen Court found that an increase in charges upon appeal justified a presumption of vindictiveness because of the likelihood that the prosecutor would seek to punish those who insisted on further proceedings. 468 U.S. at 30-31. Here, the same likelihood exists, and a presumption of vindictiveness should also apply.

The government claims that the Court of Appeals also erred in finding this case distinguishable from Goodwin because here the "simplicity and clarity of both the facts and law" left little room for the exercise of charging discretion. In the government's view, the finding ignored the fact that no United States Attorney had made an analysis of the case until the defendants determined not to forfeit collateral. The government ignores the fact that the result in Goodwin depended on this Court's finding that the possibility of new facts or analysis to support a pretrial increase in charges decreases the likelihood of vindictiveness. Where, as here, the government has revealed the absence of such new facts and analysis, the likelihood that vindictiveness explains the added charges becomes more pronounced.9/ In these circumstances, it is difficult to believe

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9/ A departure from an earlier charging decision in the absence of new facts clearly raises the specter of vindictiveness. See Martinez, 785 F.2d at 669.

If the additional charge 'aris[es] out of the
(continued...)

that the attachment of additional criminal exposure to only those who went to trial was based upon a re-evaluation of their conduct.10/

The government's contention that the Court of Appeals erred in finding that the prosecutor had an "institutional" stake in retaliating against the defendants in this case also should be rejected. The government incorrectly alleges that the appellate court cited no facts to support this finding, when the Court of Appeals cited a number of factors contributing to the burdensomeness of ~~this~~ case and thus to the government's institutional stake in avoiding trial: (1) a large group of defendants; (2) a case involving defendants who threatened to go to trial on what the government termed "petty offenses;" (3) the presence of a number of defendants proceeding pro se; (4) the intention of many defendants to raise First Amendment issues; and (5) the likelihood that a drawn-out trial would ensue. App. at 10a. It was clear to the Court of Appeals, and should be apparent to any objective observer, that the government had every reason to seek to avoid this trial. The appellate court correctly noted that such an institutional stake by a prosecutor to exercise charging discretion to discourage the assertion of rights was found to justify a presumption of vindictiveness in Blackledge v. Perry, 417 U.S. 21 at 27 (1974).11/

9/(...continued)
same nucleus of operative facts as the original charge,' a presumption of vindictiveness is raised. United States v. Robinson, 644 F.2d 1270, 1272 (9th Cir. 1981). If, however, the second charge is unrelated to the first, the presumption does not arise. See id. at 1273.

10/ For this reason as well, the appellate court found no harm in binding the prosecutor to the charging decision made by the arresting officers in this case. App. at 12a. It also noted that the government is bound only to the extent it lacks "a legitimate and articulable reason for changing that decision." Id.

11/ See also Thigpen, 468 U.S. at 31:

> [T]o the extent the presumption reflects 'institutional pressure that . . . might subconsciously motivate a vindictive

(continued...)

If there could be any remaining doubt that the prosecutor in this case was determined to chill the defendants' exercise of rights, as the Court of Appeals found, this doubt was removed by the government's decision to drop the added charge when the aggregation of offenses triggered a right to a jury trial. The government's contention that this move was nothing more than an innocuous decision that the case did not warrant the commitment of resources necessary for a jury trial defies calm response: it is as if the government believes that misconduct unabashedly admitted is less blameworthy. Indeed, the government freely admits dropping the charge to avoid the necessity "needlessly to spend additional resources." Pet. at 10, emphasis added. Clearly, the expenditure was needless and dropping the charge proper only if no legitimate reason existed to bring it in the first place.

It is apparent, and the Court of Appeals so held, that no valid basis existed for addition of a charge and that the prosecutor's upping of the ante was calculated to punish the defendants for insisting on a trial. When this retaliatory move had the result of triggering a right to a jury trial, the government moved to cut off this avenue as well. Undeniably, the government used its charging authority at every juncture improperly to penalize the respondents.

2. The government also contends that the prosecutor's offer at trial to permit defendants to pay $50 in full satisfaction of the remaining charge constitutes plea bargaining and vitiates its earlier attempt to punish the defendants who opted for trial. This argument is untenable.

11/(...continued)
prosecutorial . . . response' it does not hinge on the continued involvement of a particular individual. A district attorney burdened with the retrial might be no less vindictive because he did not bring the initial prosecution. Indeed, Blackledge referred frequently to actions by 'the State,' rather than 'the prosecutor.'

In Bordenkircher v. Hayes, 434 U.S. 357 (1978), this Court found actual vindictiveness in the prosecutor's threat to seek more severe charges if the defendant did not plead guilty to a lesser charge. However, the Court found that such conduct was justified solely by the importance of plea-bargaining to the criminal justice system (434 U.S. 364); the value which the threat of increased charges has in this system (434 U.S. 365); and the arguably equal bargaining position which a "knowing" defendant has by virtue of the "give and take" of plea bargaining, where he is free to accept or reject the government's offer (434 U.S. 362).

Relying on Bordenkircher, the prosecutor asserts that enhancement of charges to persuade a defendant to plead guilty is a routine prosecutorial tactic and is part and parcel of the plea bargaining process. Yet, as the District Court and the Court of Appeals found, no plea negotiations occurred in this case. App. at 56a-57a; 30a; 35a. The increase in charges here occurred at arraignment and arose from the defendants' decision to go to trial, not from plea negotiations. Thus, it was purely retaliatory.

Nor does the government's announcement at trial of the availability of forfeiture of collateral qualify as plea bargaining and rehabilitate its conduct. On the day of trial, the added charge was dropped as a first order of business to remove the right to a jury trial. Tr. 3. By the time the government announced its supposed plea offer, the added charge was gone. Tr. 21. It is self-evident, therefore, that the addition of a charge cannot be justified by plea bargaining, because it arose outside of the context of plea negotiations and was dropped before the supposed plea was announced.

As Goodwin makes clear, the ban against prosecutorial vindictiveness is a limit on prosecutorial action. It bars the bringing of charges calculated to punish a defendant for the exercise of rights. Charges that are vindictively motivated, that do not rise from the plea negotiation process, and of which

defendants have no notice, cannot be salvaged under any case decided by this Court.

3. Similarly, the government fails to substantiate its claim that the Court of Appeals was fundamentally wrong in upholding the dismissal of the sole remaining charge. Pet. at 12. Rather, it is clear that the Court of Appeals properly affirmed the district court's order of dismissal where the record below demonstrated both that this case presented a realistic likelihood of vindictiveness and that the remedy ordered in this case did not constitute an abuse of discretion.[12/] App. at 31a.

As noted by the Court of Appeals, "[t]he government essentially contends that when confronted with prosecutorial vindictiveness, a court has authority only to dismiss the additional, 'tainted' charge.'" Id. According to the government, the failure of the Court of Appeals to limit the remedial authority of the district court in this case renders its ruling "plainly in error."[13/] Pet. at 13. But, as the Court of Appeals found below, neither reason nor case law supports the government's position.

The doctrine of prosecutorial vindictiveness was designed by the Supreme Court "to be largely prophylactic in nature" (App. at 14a) -- i.e., not only to protect the present defendant from vindictiveness but also to prevent the chilling of the exercise of rights by other defendants in the future. United States v. Motley, 655 F.2d 186, 188 (9th Cir. 1981). See also United

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12/ With respect to the requisite standard of review, the Court of Appeals stated as follows:

> The choice of remedy for governmental misconduct rests within the sound discretion of the lower court; an appellate court may reverse an order remedying such misconduct only if the order constitutes an abuse of discretion. See United States v. Artuso, 618 F.2d 192, 196 (2d Cir.), cert. denied 449 U.S. 861.

App. at 5.

13/ In so casting its argument, the government apparently concedes its inability to meet the "abuse of discretion" standard that the Court of Appeals found applied to the remedy issue.

States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978) (dismissal of indictment based on governmental misconduct used as a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature). To hold that dismissal of the additional "tainted" charge is the only available remedy would vitiate the deterrent effect of the doctrine (App. at 14) and would render as a nullity its prohibition against prosecutorial vindictiveness. If, as the government argues, the only remedy available in cases of vindictive prosecution is dismissal of the additional charge, then the prosecutor will always have the option available to dismiss the charge before a ruling on vindictiveness can occur. He will have no incentive not to engage in misconduct.

Further, as in the instant case, the prosecutor's misconduct and its consequential harm may go unchecked. For example, the trial court in this case found that, in retaliation for exercising their right to a trial, the government vindictively brought an additional charge against the defendants. Consistent with its prior conduct in penalizing the defendants' exercise of their right to a trial, the government dropped the additional charge after the defendants successfully moved for a jury trial. Through its voluntary dismissal of the additional charge, the government sought to deprive the defendants of a jury trial, insulate itself from sanction, and tie the court's remedial hands. Under the circumstances, it was incumbent upon the district court to protect defendants from such misconduct. It was equally necessary for the Court of Appeals to refuse to "countenance the government's attempt to so vitiate the prohibition against prosecutorial vindictiveness." App. at 14a.

Clearly, dismissal of the added charge is the usual judicial remedy in vindictive prosecution cases. The Court of Appeals acknowledges this to be so. However, in rejecting the government's argument, the Court of Appeals properly concluded that dismissal of the added charge is not, and should not be, the only remedy available to trial courts. Indeed, the government's

petition cites no case which so limits the remedial powers of courts in vindictive prosecution cases.

The government relies on United States v. Morrison, 449 U.S. 361 (1981), to argue that dismissal of the remaining charge violated the general rule that remedies should be tailored to the injury suffered. Simply stated, its reliance is misplaced. In Morrison, the Supreme Court reasoned that where a violation of the Sixth Amendment right to counsel did not render assistance of counsel ineffective and where there were other available remedies in the event of any harm, dismissal was not an appropriate remedy.

However, where, as here, a prosecution has been vindictively brought, it is the very act of prosecuting and its effect on the future exercise of rights which is the harm to be remedied. The Morrison court did not confront the harm of vindictiveness nor did it address the appropriateness of a remedy in the context of vindictive prosecution. Indeed, in the case at bar, where the harm of vindictiveness has been found and where there are no other remedies, dismissal fully comports with the Morrison directive to tailor relief appropriately. 449 U.S. at 364.

Similarly, Smith v. Phillips, 455 U.S. 209-(1982), United States v. Payner, 447 U.S. 727 (1980) and United States v. Mitchell, 322 U.S. 65 (1944) do not mandate a reversal of the Court of Appeals' ruling. In fact, the issue of vindictive prosecution and an appropriate remedy for such vindictiveness did not arise in any of these cases. In Smith, the Supreme Court concluded that a prosecutor's failure to disclose potentially compromising information about a juror did not deprive the defendant of his due process right to a fair trial where a post-trial hearing found no juror bias. Where, as here, it is the very act of prosecuting which constitutes the government's misconduct, reliance on a "fair trial" analysis is ludicrous. Further, in Payner, where the defendant suffered no violation of his constitutional rights, and in Mitchell, the Supreme Court held that, in exercising supervisory powers, courts are not

authorized to suppress evidence admissible under the exclusionary rule of the Fourth Amendment notwithstanding governmental misconduct. However, both the Payner court and the Mitchell court made no attempt to broaden the sweep of their holdings;[14/] and thus, the government's attempt to suggest that Payner and Mitchell limit the general remedial powers of courts is ill-founded.

Finally, the government's assertion that the Court of Appeals' decision to uphold dismissal of the remaining charge conflicts with decisions of the Ninth and Sixth Circuits is a gross exaggeration and flagrant attempt to "create" a conflict among the circuits. Admittedly, in both United States v. Hollywood Motor Car Company, 646 F.2d 384 (9th Cir. 1981), rev'd on other grounds, 458 U.S. 263 (1982), and United States v. Andrews, 633 F.2d 449 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927 (1981), the Ninth and Sixth Circuits respectively found that the ordinary remedy for prosecutorial vindictiveness is dismissal of the augmented charge. Neither case held, or even suggested, that dismissal of the augmented charge is the only remedy. In both Hollywood Motor Car Company and Andrews, the obvious remedy of dismissing the augmented charges was available to the respective courts. Consequently, both the Ninth and Sixth Circuits, unlike the Court of Appeals here, could dismiss the augmented charge as well as sanction the government's misconduct.

Moreover, the court in Hollywood Motor Car Company did not find dismissal of the original charge to be an abuse of discretion; rather, it fashioned its own remedy after finding prosecutorial vindictiveness.[15/] Likewise, the Andrews court was

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14/ In fact, the Payner court expressly limits its holding. See Payner, 447 U.S. at 737 n.8 ("our decision today does not limit the traditional scope of the supervisory power in any way. . . .").

15/ In Hollywood Motor Car Company, the trial court had concluded that there was no prosecutorial vindictiveness. After determining that the trial court was in error, the Ninth Circuit went on to discuss remedial aspects. Thus, the court of appeals in Hollywood Motor Car Co. was not in the posture of reviewing a district court's remedy for abuse of discretion.

not confronted with a determination of whether the dismissal of an original charge constituted an abuse of discretion. Indeed, with the exception of one passing reference to the "ordinary" remedy (633 F.2d at 455), the Andrews court never addressed the issue of remedying prosecutorial vindictiveness.16/

Thus, the Court of Appeals decision to uphold Chief Judge Robinson's dismissal of the remaining charge in light of the particular and undisputed facts of this case, notwithstanding its recognition of the extreme nature of the remedy, does not create a conflict among the circuits, constitute an abuse of discretion, or establish erroneous precedent warranting this Court's review.

4. Finally, the government attempts to elevate its concern for administrative efficiency over the defendants' due process rights by asserting that this Court should grant certiorari in this case to undo alleged damage that this decision poses to the functioning of the magistrates' citation system. This contention is also without merit.

The government's concern for the effect of this decision on the functioning of the magistrates' citation system in mass arrest cases is clearly a smoke screen. That system is not the issue here. It is the conduct of the government in proceedings subsequent to the magistrates' citation system that is at issue; and the government's prediction of disaster does not withstand analysis.

The government claims that the Court of Appeals' decision wrongly will not permit prosecutors to exercise a "technical precision" not possessed by arresting officers in drawing up informations. The driving need for this exercise is unsubstantiated. As the Court of Appeals correctly pointed out, in mass arrest cases, the decisions of arresting officers are binding on those who opt for summary procedures. It is

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16/ In Andrews, the Sixth Circuit, after finding that the trial court's application of a per se appearance of vindictiveness standard was improper, vacated the judgment of the district court and remanded the case for further proceedings. As a consequence, the court of appeals in Andrews never discussed remedial aspects.

incongruous to argue that the same decision, by itself and without additional information, becomes inappropriate when an arrestee opts for trial.17/

The government's argument with respect to the havoc this decision will allegedly wreak on the functioning of the magistrates' citation system in mass arrest cases is also unpersuasive. It fails to acknowledge the narrowness of the holding in this case, a holding prompted by unusual prosecutorial maneuvering which, if repeated, should not be condoned. This holding will not complicate mass arrests -- indeed, the Court of Appeals has suggested a means to avoid the misconduct that occurred here. If properly applied, the only effect of this decision will be salutary for all concerned -- with defendants' due process rights properly protected.18/

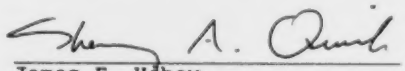
17/ This is not to imply absolutely, as the government does, that the decision by certain defendants to use summary procedures requires the government to treat all defendants identically. Rather, the availability of summary procedures establishes a reliable measure of the societal interest in the criminal proceeding. When the government departs from this charging decision without warning, for only those defendants who go to trial, it is clear that the additional charge is retaliation, not legitimate prosecutorial action. For this reason, the government's citation of Newman v. United States, 382 F.2d 479, 481-82 (D.C. Cir. 1967), for the proposition that the prosecutor is not bound to treat persons who have committed the same legal offense similarly is unavailing. The accused prosecutorial misconduct is not selective prosecution; it is prosecutorial retaliation. The difference in treatment of defendants is relevant to the extent it highlights retaliation.

18/ The government's claim that the holding in this case will bind prosecutors to an officer's initial charging decision is unavailing. While factually similar cases may arise in the future, it is a simple matter for the government to restrain itself from the retaliatory addition of charges, without notice, for defendants who opt for trial. Its complaint that the opportunity to refute the presumption of vindictiveness is empty because the Court of Appeals did not accept its explanation here fails to recognize that both the appellate and trial court acknowledged and correctly rejected the explanation. App. at 6a, Tr. 49. Indeed, this explanation was nothing more than a hollow recitation of the standard for exercise of prosecutorial discretion -- with no indication whether and how it was applied. The government's claim that Bordenkircher may not be satisfied by a warning on the citation that failure to forfeit collateral may result in the addition of charges can only be based on an unduly confined and untenable reading of that case.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny the government's petition for a writ of certiorari.

Respectfully submitted,



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December 31, 1987

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day December, 1987, a copy of the foregoing Respondent's Brief in Opposition, Motion of Judith Hand for Leave to Proceed In Forma Pauperis, and Affidavit in Support of Motion to Proceed In Forma Pauperis has been served by first class mail, postage prepaid to: Daniel Ellenbogen, Esq., 3144 Plyers Mill Road, Kensington, MD 20895; Carol Bellin, 12 Thorpe Street, Somerville, MA 02143; Rita Toll, 11 Seaverns Avenue, #5, Jamaica Plains, MA 02130; JoEllen Childers, 1644 Newton Street, N.W., Washington, D.C. 20010; Mindy Washington, 230-14 88th Avenue, Queens Village, NY 11427; Jake Weinstein, 44 Judson Avenue, New Haven, CT 06511; Teri Galvin, 84 D Reservoir Avenue, River Edge, NJ 07661; Marge VanCleif, 196 Mansfield Street, New Haven, CT 06511; Chris Meyer, 6612 Clemens #1 West, St. Louis, MO 63130; J.D. Hearn, RR#1, Box 373, Forrestburg, NY 12777; Theresa Fitzgibbon, 564 Centre Street, Trenton, NJ 08611; Virginia Senders, Pelham Hill Road, Shutesbury, MA 01072; Sebastian Graber, Esq., 1019 King Street, Alexandria, VA 22313; and Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1987

United States of America, Petitioner

v.

Christine Meyer, Et al.
Mindy Washington, Teresa Galvin, Kitty
Fives, JoEllen Childers, **Pro Se Respondents**
(Case No. 87-730)

BRIEF IN OPPOSITION TO THE
GOVERNMENT'S PETITION
FOR A
WRIT OF CERTIORARI

Mindy Washington, Pro Se Respondent
Teresa Galvin, Pro Se Respondent
Kitty Fives, Pro Se Respondent
JoEllen Childers, Pro Se Respondent

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1987

No. 87-730

United States of America
(Petitioner)

v.

Christine Meyer, et al.

BRIEF IN OPPOSITION TO THE GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI

On October 29, 1987, the United States of America petitioned for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia. we now offer this Brief in Opposition to deny the Government's request of October 29, 1987.

The chronology of the instant case is a matter of record. We offer a re-telling of that chronology in our Appendix I (see Attached). Therefore, we will proceed directly with our justifications for denying the requested Writ of Ceriorari.

REASONS FOR DENYING THE GOVERNMENT'S PETITION

On Page 7 of the Government's petition, they make the assertion that, based on U.S. v. Goodwin, and the elements of plea bargaining therein, the U.S. Court of Appeals decision should be invalidated. Additionally, they allege that the defendants (now respondents) in this case always had the option of forfeiture of the fifty dollar collateral on the original misdemeanor charge.

We cannot emphasize strongly enough that the elements of plea bargaining alleged to have taken place in fact never occurred. The respondents were prepared to testify under oath at the original hearing in District Court (Sept. 11, 1985) as to the falsehood of this claim by the government (Trial Transcript, P. 17:7-23) (hereinafter TR #___:___).

It is a matter of record that Chief Judge Robinson determined that plea negotiations did not take place (US of A Petition for Certiorari, 56A), as did the Court of Appeals for the District of Columbia Circuit, in its Order of July 31, 1987, denying en banc review of this case (see Order of July 31, 1987, arguments in favor of denials of rehearing en banc, Circuit Judge Silberman, page 3; and Circuit Judge Mikva, p. 2).

As for the $50 collateral, it was never represented to the respondents that the opportunity of forfeiting the money ($50 collateral) continued to be an option whenthe respondents, elected to stand trial. In fact, attorney Ellenbogen states (TR #17, 9-11-87), that "I am aware that a number of people may have gone ahead and sent in the $50 hoping that the court would accept it and there was always the risk that the court would not and in fact, some of the defendants had their $50 collateral returned". This should make it clear that the $50 forfeiture was not common knowledge, nor an option to any and all respondents.

Since we have asserted the foregoing time and again, and since we have even offered to assert it under aoth, we therefore fail to understand the government's insistence that their version of these matters is factual. The lower courts, as well as our own testimony, and the records of this case clearly show that the government's statements as regards the $50 forfeiture of collateral are incorrect.

THE SECOND CHARGE

As can be noted in the record of the case, when respondents appeared for arraignment, they were suddenly faced with two (2) criminal counts, rather than the one (1) they had been notified of, and hence expected. The arraignment notices mailed to respondents only notified them of ONE charge, that of demonstrating without a permit (in violation of 36 C.F.R. 50.19). No forewarning of possible further charges was either stated straightoforwardly or intimated, and no plea bargaining took place before the second charge was added. (See attached copy of arraignment notice, Appendix I). Without any warning whatsoever, this second charge was added, suddenly requiring respondents to weigh the jeopardy of potential penalties now twice as severe, and prepare their defense against an unanticipated second charge. It must also be noted that the Governement has admitted that no new facts or information had been discovered which would have informed this decision that a second charge was warranted (TR. # 19-21, 9-11-85). Additionally, the government

has never offered an explanation of the "broader significance" rationale which was given for the second charge, noted on page 20 of the September 11, 1985 transcript. If indeed the Government perceived a "broader significance" or "societal interest" in adding the second charge (that of obstructing sidewalks adjacent to the White House), then that same "significance" or "interest" (to this day, still an unexplained mystery) did not last long, and therefore could not have been very "significant" or "interesting" at all, since the government dropped the second charge at the very outset of the September 11, 1985 hearing (TR. #2, 9-11-85).

The petitioner's claim was that dropping the second charge was motivated solely by economic considerations. Are we to believe that such consierdations never came up during the initial review of the instant case? The assertion that these economic factors preclude any vindictive behaviour is invalid since, as the Court of Appeals stated in its order of February 13, 1987, "The Supreme Court previously had recognized that the government's interest in discouraging unexpected and burdensome assertions of legal rights may rise to a level that supports use of a presumption of vindictiveness. See Blackledge, 417 U.S. at 27." Furthermore, the petitioner's continuance of this case to the highest court in the land belies their claim of economic considerations. As ever, they succeed in being inconsistent in both argument and posture.

THE QUESTION OF THE DISTRICT COURT'S REMEDY

Chief Judge Robinson found that the only remedy in this case was the dismissal of the remaining information against the defendants, (the original misdemeanor charge). The Government objects to this on the grounds that is was overbroad, and that the original misdemeanor was "untainted" by allegations of vindictiveness. The question must be raised, however, as to what other remedy was available to the District Court? We presume that Chief Judge Robinson clearly saw the dismissal as his only answer to the violation of respondents' due process rights in this era of overreaching governmental authority.

THE MAGISTRATE'S CITATION SYSTEM

The government claims that to let the previous ruling in this case stand as they are would place unnecessary burden upon the Magistrate's Citation System. This is an untenable position. As Circuit Judge Mi<va

ruled in the February 13, 1987 Order ".... the government need only note on the citation form that the defendant will expose himself to enhanced charges if he elects to go to trial"(Court of Appeals, Feb. 13, 1987, page 13).

CONCLUSION

Since the Court of Appeals makes it clear that the District Court's decision is not binding on other cases, and even admonishes lower courts to "inspect closely both factual circumstances and remedial alternatives before dismissing entire informations", we can find no basis for granting the Writ of Certiorari requested by the Government. **Therefore,** we request that the Government's Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, **be denied.**

Respectfully Submitted:

Mindy Washington, Pro Se Respondent
Teresa Galvin, Pro Se Respondent
Kitty Fives, Pro Se Respondent
JoEllen Childers, Pro Se Respondent

December 1987

CERTIFICATE OF SERVICE

I hereby certify that the following parties were served by mail, with copies of the BRIEF IN OPPOSTION TO THE GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI as of December 30, 1987:

James F. Hibey and Sherry Sherry A. Quirk, Verner, Liipfert, Bernhard, Mcpherson and Hand, Suite 1000, 1660 L Street NW, Washington D.C. 20036; Daniel Ellenbogen, 3144 Plyers Mill Road, Kensington, MD, 20895; Sebastian Graber, 1019 K Street, Alexandria, VA 22313, The Solicitor General's Office, Department of Justice, Washington D.C. 20530.

Mindy Washington

Mindy Washington, Pro Se Respondent

APPENDIX I

BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 85-6171

UNITED STATES OF AMERICA — Appellant

vs.

THERESA FITZGIBBON, et. al. — Appellees

No. 85-6169

UNITED STATES OF AMERICA — Appellant

vs.

CHRISTINE A. MEYER, et. al. — Appellees

No. 85-6172

UNITED STATES OF AMERICA — Appellant

vs.

VIRGINIA SENDERS, et. al. — Appellees

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mindy B. Washington
Teresa Galvin
Kitty Fives
Theresa Fitzgibbon
PRO SE DEFENDANTS

Cr. Nos. 85-00330; 85-00329; 85-00331

STATEMENT OF THE CASE

On April 22, 1985, appellees were among a group of approximately 329 persons arrested on the White House sidewalk. As United States citizens, appellees had assembled to speak out against a number of their government's policies. Each of the policies appellees challenged had been formulated by the executive branch, which was actively seeking to implement those policies. We who were eventually arrested were engaged in a simple exercise of citizens' rights guaranteed by the First Amendment to the Constitution: freedom of speech, freedom of assembly, and the right to petition the government for redress of grievances.

We assembled at the White House sidewalk pursuant to a permit. Upon arrival at the White House, and contrary to what is inferred by appellant (Appellant Brief, p.3, footnote 2), the White House sidewalk along Pennsylvania Avenue, up to and including the driveway entrances, were already closed off to pedestrian and vehicular traffic by police barricades. We were ushered into the barricaded area by the police. Consequently, it was not any alleged "seating" arrangement on our part that caused obstructions to pedestrian and vehicular traffic; the police barricades created the obstruction even before our arrival. We did, however, take up places in front of the entrances very soon after our arrival at the White House.

We remained situated in this police-controlled area and in the same manner for more than two hours. After approximately two hours, the police announced that our permit had been revoked. Because we had been conducting ourselves in the same manner

practically since our arrival at the White House and because no reason for revocation was announced, it seemed that our First Amendment rights had simply expired - although of course we are not aware of a time limitation on such important democratic rights. If we were in violation of permit regulations, we should have been notified immediately or in a more timely manner. There were no grounds for revocation for behavioral reasons.

Each arrestee was given a citation form citing a charge of Demonstrating Without a Permit (36 C.F.R. 50.19). On May 29, 1985, the first of three afraignment dates, the defendants at that hearing pleaded "not guilty" to the only charge they knew of, Demonstrating Without a Permit. It was only after pleading that they discovered they had actually been pleading to two counts, a second charge having been added. The second charge was "Obstructing Sidewalks Adjacent to the White House" (36 C.F.R. 50.30. Each charge carries a maximum penalty of $500 and imprisonment of not more than six months. Without any warning whatsoever, a second charge was added - suddenly requiring each of us to weigh the jeopardy of potential penalties twice as severe and to prepare to defend ourselves against a second new charge.

The arrest citation presented two basis options: first, to sent $50 to dispose of the matter, or, second, to return the form checking a box to indicate a desire for a court appearance. Never having been informed otherwise, appellees deduced that once the court option had been pursued to the point of appearing and entering a plea, the option of posting $50 had been foregone.

At the second arraignment on June 21, 1985, the government promised the defendants at that arraignment that they would be given reduced sentences in exchange for a plea of "guilty." Because defendants understood that such an act would be an acceptance of guilt regarding a criminal act, all refused the government's offer. When appellees asked whether their co-defendants who had been subjected to the initial surprise of the second charge would have the same option, we were essentially told, "this offer is for you, take it or leave it."

Ms. Childers, the only pro se defendant who lives in the Washington, D.C. area, met with Prosecutor McDaniel on at least three occasions to discuss discovery matters. During the course of those meetings, Mr. McDaniel tried to "sell" the guilty plea option a number of times. Additionally, never once throughout these meetings nor in the course of a number of telephone calls did Mr. McDaniel call to the attention of Ms. Childers that the option of paying $50 continued to be a live option for defendants - contrary to what Mr. McDaniel suggested at the September 11, 1985 hearing.

Pro se defendants made every effort to deal with the government in good faith: we provided accurate lists of names and addresses; we made requests for meetings and for discovery materials in a timely manner so as to avoid placing undue time pressures on the government's daily business; and, we informed ourselves of all applicable rules of the District Court. We do not think the government interacted with pro se defendants in the same good faith manner. While we understand the adversarial nature of judicial system, it is little wonder to us that

thoughtful people from time to time raise questions as to whether justice is produced by our court system - when on a day to day level lawyers and prosecutors apparently in a routine manner interact with each other in such a jaded and cynical manner.

As an extreme, but nonetheless true, example of the government's less-than-good-faith dealings with pro se appellees, there is the subject of stipulations which was brought up at the September 3, 1985 discovery meeting. Prosecutor McDaniel and Attorney Ellenbogen had apparently discussed the possibility of entering into stipulations prior to that meeting. During the meeting they agreed in principle to stipulate. Upon their agreement, Ms. Childers simply pointed out to Mr. McDaniel that the self-represented defendants had not made such an agreement but that we would be interested to review written proposed stipulations. Mr. McDaniel responded to Ms. Childers warning that Judge Robinson would be very angry if pro se defendants failed to stipulate and that the result would be convictions and jail sentences of ten days to be served immediately without release pending an appeal of such sentence. Ms. Childers reiterated her previous statement. Pro se defendants did perceive Mr. McDaniel's response as a threat, not because we thought he had the power to produce such an outcome singlehandedly, but because we realized that he was one of the few key players in the court proceedings and we felt it foolish to underestimate his power to influence the outcome.

On September 6, 1985, Judge Robinson issued ruling on defendants' pre-trial motions. Judge Robinson accepted only one

motion: defendants' request for a jury trial, basing the ruling on the fact that we faced two charges, each with potential penalties of $500 fines and up to six months imprisonment. Earlier, September 3, 1985, at a attended by Attorney Ellenbogen, Pro Se Defendant Childers and Prosecutor McDaniel, Mr. McDaniel stated his intention to drop one of the charges in order to undermine the jury trial (see attached Pro Se Defendants' Motion to Deny Request for Reconsideration 10/24/85, p.4). When Ms. Childers asked him which charge he would drop, Mr. McDaniel said it didn't matter, that either would be fine - thus leaving us in suspense as to which charge against which we would be defending ourselves. At the September 11, 1985 hearing Mr. McDaniel did indeed drop the charge that had been added, Obstructing the Sidewalks Adjacent to the White House (Tr. 2-3).

On September 6, 1985, Judge Robinson also informed all parties to the case that he wanted to hear arguments at September 11, 1985 hearing regarding the Defendants' Motion to Dismiss for Vindictive Prosecution. After Judge Robinson had heard all arguments, he ordered the charges dismissed against all defendants.

ARGUMENT

On April 22, 1985, officers of the U.S. Parks Police arrested a number of persons, including appellees, on the charge of demonstrating without a permit. The Appellant's Brief (P.3, Footnote #2) points out that the Appellees have never stood trial on this charge (in fact, the charge was dismissed by the Honorable Aubrey E. Robinson, Chief Judge, on September 11, 1985, on the grounds of Vindictive Prosecution). Had the appellees stood trial, they would have proven that there was initially a permit to demonstrate (referred to by appellant as "parade permit", p.3, footnote #2, Appellant's Brief). The appellees proceeded to the White House pursuant to this permit. Upon arrival at the White House, and contrary to what is inferred by Appellant (p.3, footnote #2, Appellant Brief), the sidewalks immediately adjacent to the White House, up to and including the driveway entrances, were already closed off to pedestrian and vehicular traffic, with specific boundaries quite apparent to the participants, who were ushered into this area. It was not any alleged "seating themselves" that caused obstructions to pedestrian and vehicular traffic. More than one hour elapsed, of exactly the same behaviour, before the Parks Police notified the participants that they were in violation of the permit; more than 45 minutes more elapsed before they were told the permit had been revoked. The sidewalks had already been closed upon the arrival of the participants. There was no behavioural differential during the time preceding and up to the revocation of the permit. If participants were in violation of permit regulations, they

should have been notified immediately. There were no grounds for revocation on this basis.

Each individual was given a Parks Police citation form, charging them with Demonstrating without a Permit, in violation of 36 CFR 50.19. On May 29, 1985, was the first of 3 arraignment dates. The defendants there pleaded "not guilty" to the only charge they knew of, that of Demonstrating without a Permit. It was thereafter that they discovered they had actually been pleading to two charges, a second charge having been added, unbeknownst to them, prior to their pleading. The second charge was that of "obstructing sidewalks adjacent to the White House" (36 CFR 50.30). Each charge carries a maximum penalty of $500 and imprisonment for not more than 6 months.

At the hearing before Chief Judge Aubrey E. Robinson Jr. on Sept. 11, 1985, Count One was dismissed by the Government against each defendant. This was objected to by defense counsel Ellenbogen. The motion was granted over Ellenbogen's objections. Ellenboegen's chief objection was that the motion to dismiss Count One was "motivated solely for the purpose of depriving the defendants of their right to a jury trial" (Trial Transcript P.3, hereinafter TR #__), since the trial court had previously granted the defendants' entitlement to a jury trial. A look at the Defendants' Motion to Deny Government Request for Reconsideration of Dismissal Order (hereinafter Defendants' Motion 10/24/85) filed on October 24, 1985 and accepted by the court on October 28, 1985, (see copy of certified mail receipt, attached) will substantiate the reasons for the September 11 dismissal order, vindictive motivation in prosecuting this case: Item 5, p. 4 of

Defendants' Motion 10/24/85, states that

> "at a discovery meeting on September 3, 1985, the Asst. U.S. Attorney specifically stated to parties for the Defendants that the Government intended to drop one charge in order to undermine the Defendants' right to a jury trial...." (Defendants' Motion 10/24/85).

If this does not prove that a questionable motivation was at issue, and in fact existed, on the part of the prosecution in this case, the appellees are at a loss as to what does.

THE QUESTIONABLE ANALOGY OF U.S. vs. GOODWIN

The appellant continually cited U.S. vs. Goodwin (457 U.S. 368(1982)) during the September 11, 1985 hearing before Chief Judge Aubrey E. Robinson Jr. (The Honorable A.E. Robinson Jr. declared during the Sept. 11 hearing that "It is my view that Goodwin does not control this case on the facts that we know" , TR#47), and throughout its recent brief, maintaining that the instant case was easily compared to Goodwin. Several points must be addressed here:

1. Goodwin's case involed more serious charges only after a plea bargaining scenario. In the instant case, no plea bargaining session was offered or initiated by either party prior to the first arraignments. On this basis, U.S. vs. Goodwin is

not an analagous case. In fact, the prosection on Sept. 11, 1985, asserted that the plea bargaining scenario (which Goodwin refused to enter into) and the payment of $50 collateral are the same thing (TR#29). However, these are two completely separate procedures within the criminal system. Payment of the $50 collateral does not preclude appearance before the court, and is not necessarily an admission of guilt, nor does it afford the defendants any opportunity to enter into plea negotiations.

2) At the 1st arraignment of May 29, 1985, and after the defendants present had pleaded to what they believed to be only one charge (Demonstrating without a Permit), it was discovered that a second charge had been lodged against the defendants in this case. According to the government, they were allowed to do this because the prosecution retains the right to add charges after examination of "additional facts", and on the basis of serving the public interest in deterring future violations.

At the hearing of Sept. 11, 1985, the prosecution failed to present additional facts, or substantiation of society's interest in stiffer penalties against the defendants. Appellees' assertion in this instance is substantiated by the following exchanges from the Sept. 11, 1985 hearing:

> MR. MCDANIEL: ...in Goodwin... the court stated very clearly that in the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or simply come to realize that the

information presented by the state has a broader significance" "THE COURT: ...But you don't have that situation here. There is no additional information that wasn't available to the prosecution at the very outset when the arrests were made." (Chief Judge Robinson, TR#20); and

"THE COURT: You knew everything except the details of what the officer would testify to and the confirmation of the alleged misconduct was known at the time that they were given the ticket" "MR. MCDANIEL: The facts were known, your Honor". "THE COURT: Certainly they were known". (TR#21).

In light of the fact that the defendants were exercising their First Amendment rights, the appellees must question what possible "broader significance" could be found on the basis of the facts of this case. What society are we living in whose interests are best served by "throwing the book" at individuals who exercise their Constitutional rights? At best, a society such as this is totalitarian, and not based on any Democratic principles.

In fact, it is clear that the prosecution is prejudicial against the Constitutional elements of this case, as is evidenced by the following excerpt from the transcript of Sept. 11, 1985:

"THE COURT: Your Goodwin defendant was not exercising any basic Constitutional right". "MR. MCDANIEL: THat

> is true, your Honor. The Constitutional element of this case, because of the relative inseverity of the offense, I believe the court should overlook for the purpose of this particular motion (emphasis added) (TR#32).

In attempting to ignore the Constitutional elements of this case, which is essentially based on the defendants' exercise of their First Amendment rights, the appellees can see only a vindictive attitude on the part of the prosecution.

3) The analogy of Goodwin is absurd for another reason; Goodwin was arrested for misdemenaors perpetrated while driving on the Baltimore-Washington Parkway. By denying the Constitutional elements of the instant case, it is easy to see how the appellant could mistakenly make the analogy between Goodwin and the instant case. However, as Chief Judge Robinson said at the Sept. 11 hearing, "There is no Constitutional right to drive" (TR#32). Additionally, Goodwin declined to enter into a plea, and as a result, the case was reassigned to a different prosecutor. At that point, a felony indictment was handed down. "They were the same facts, the same charges, but they were simply charged as more grave offenses" (emphasis added; Mr. McDaniel, TR#30). While that may be, in the instant case, charges were added - without new information, without plea negotiations. The only result of the added charges were stiffer fines and longer sentences. In adding charges that would "up the ante" of the case, the appellees can only see an attempt to intimidate them

into foregoing the right to trial. This is further substantiated by the admission of the prosecutor at the September 3, 1985 discovery meeting, regarding dropping "one charge in order to undermine the Defendants' right to a jury trial" (Defendants' Motion 10/24/85). If the second charge was in fact in "society's interest", there could be no reason to drop one of the charges. As CHief Judge Robinson said at the Sept. 11, 1985 hearing, "I think that gives the government a problem" (TR#27).

4) Unlike Goodwin, who had foreknowledge of possible consequences arising out of plea negotiations, and had foreknowledge of the possibility to plea bargaining, the appellees maintain that this foreknowledge did not exist in the instant case. Under the Constitution, a person charged has a right to the knowledge of the charges before them and to the knowledge of their options. In the instant case, it is clear that the defendants did not have this foreknowledge, and this is substantiated by the following excerpt from Chief Judge Robinson's closing statements at the Sept. 11, 1985 hearings:

> "THE COURT: These cases all have to depend upon the facts, and it is uncontradicted on this record that having been arrested, everyone of these defendants knew exactly what he was arrested for.
>
> They show up for an arraignment, and have to respond to an information involving two counts.
>
> There was no notice, formal, informal, to the individual pro se defendants or through counsel that the possibility existed that if they didn't post the

collateral or foreit the collateral, they were going to be subjected to additional charges whether or not they arose out of that incident or anything else that the government chose legitmately to bring against them which is an entirely different situation.

The initial charge, a petty misdemeanor, the minimum possibility of a fine or incarceration, suddenly blossoms into the possibility of a $1000 fine and a year in jail absolutely out of the blue, so to speak, with no additional reasons that could have possibly been conjured up or in fact were offered by the government, although the government is not obligated, necessarily, to tell you its reasons, but there has to be some basis for it which changes the situation.

Goodwin clearly indicates to this court that whatever the basis for the change in the government's position, some knowledge and information has to be given to an individual defendant so that she or he can make the determination or election whether they want to face the additional charges.

No such opportunity was ever afforded any one of the defendants presently charged through counsel, through notice, or anything else." (TR#48 & #49).

In fact, even up to the time of the notice of arraignment, the defendants were not notified as to a second charge. (See attached Notice of Arraignment).

Was the trial court's order overbroad?

According to the government, "If the prosecutor's decision to add a charge of obstructing sidewalks was vindictive, the proper remedy would be to dismiss that count and leave standing the original charge, Demonstrating without a Permit." (Appellants' Brief P. 41, Section C).

The appellees maintain that the harm was already done. As stated above, the prosecution made it clear during the Sept. 3, 1985 discovery meeting that the government intended to drop one charge to undermine the defendants' right to a jury trial (Defendants' Motion 10/24/85). The fact that the second or "tainted" charge was dismissed is simply a moot point. What stands is the fact that the second charge was simply a tool to be used by the government to intimidate and coerce the defendants into foregoing trial, and then to be tossed aside when it no longer served their purposes. The fact that the second charge was dropped substantiates appellees' initial allegation that there was no factual reason behind the second charge.

CONCLUSION

Intimidation and coercion have no place in a democracy. Convictions arise out of an informed conscience. We cannot suspend our conscience in the name of jingoistic hubris. We know all too well that one's patriotism is questioned by the present

administration if one should disagree with its' policies. Since silence implies consent, one must stand and be counted among the truly free - those who do not fear the consequences of their actions; and because we are fortunate enough to live in a country that allows, by its First Amendment, the right to any citizen to peacefully assemble and petition.

The government should not have the power to misuse the legal system to further its own ends. Justice will not be served by remanding this case back to District Court. By upholding the trial court's decision, the judicial system will be protecting the inalienable rights of the citizens of this country as guaranteed by the U.S. Constitution.

THEREFORE, the appellees respectfully submit that this case not be remanded back to district court, and the trial court's dismissal order of September 11, 1985, be allowed to stand.

Mindy H. Washington Mindy H. Washington

Teresa Galvin

Kitty L. Fives Kitty L. Fives

Theresa Fitzgibbon

Pro Se Defendants

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C., 20001

June 5, 1985

Mendy Washington
230-14 88th Ave.
Queens, N.Y. 11427

Dear Ms. Washington:

You were cited by the United States Park Police on April 22, 1985 for the alleged violation of 36 C.F.R. 50.19, Demonstrating Without a Permit.

A hearing in your case has been set for June 21, 1985 at 9:30 a.m. before a United States Magistrate. You may wish to appear with counsel. The attorneys who had previously arranged to represent persons arrested in the demonstration have agreed to continue representing you, if you so desire. For more information you should contact Daniel Ellenbogen at (202) 234-4083, in advance of the hearing.

At the hearing the Magistrate will advise you of the charges pending against you and your rights as a defendant. Depending on your plea to the charges, a further date will be set for a trial. Should you choose to forego a hearing and wish to pay the original fine of $50.00, you should send payment, with your ticket, to the Clerk, U.S. District Court, Room 102, Post Office Building, 200 S. Washington St., P.O. Box 118, Alexandria, Virginia 22313.

This notice supersedes all previous hearing dates and/or notices. Failure to appear at the above scheduled time and date may result in the issuance of a bench warrant.

Please report to Courtroom 10 on the 4th floor of the United States Courthouse, Third and Constitution Avenue, N.W., Washington, D.C.

Very truly yours,

JAMES F. DAVEY, Clerk

By _____
GREG HUGHES, Deputy Clerk
(202) 535-3503

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 87-730

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

UNITED STATES OF AMERICA, Petitioner

v.

CHRISTINE MEYER, ET AL., Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

RESPONDENT MARY S. DAILY'S BRIEF IN OPPOSITION

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Counsel for Respondent Daily

QUESTIONS PRESENTED

1. Whether a rebuttable presumption of prosecutorial vindictiveness may be applied in the pretrial context where no plea negotiations transpire prior to filing the enhanced charge and where circumstances demonstrate both a realistic likelihood of vindictiveness and actual vindictiveness.

2. Whether a district court has power to dismiss a case when it makes a finding of actual or presumed vindictiveness and no other remedy is available to meaningfully deter prosecutorial misconduct.

TABLE OF CONTENTS

Appendix (cont'd)

TABLE OF AUTHORITIES

No. 87-730

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

UNITED STATES OF AMERICA, Petitioner

v.

CHRISTINE MEYER, ET AL., Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT MARY S. DAILY'S BRIEF IN OPPOSITION

Respondent Mary S. Daily, by counsel, respectfully requests that this Court deny the petition for a writ of certiorari, filed by the government, seeking review of the court of appeals' decision in this case. That opinion is reported at 810 F.2d 1242 (D.C. Cir. 1987) (App. to Pet. for Cert. 1a).

COUNTERSTATEMENT OF THE CASE

Respondent Mary S. Daily was among 195 demonstrators arrested on the White House Sidewalk on April 22, 1985, as part of a "Peace, Jobs and Justice" rally intended to protest policies of the Reagan Administration. Counsel herein was appointed to represent Ms. Daily in the district court pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A (1981).

The factual and procedural details of the case are set forth in the Briefs in Opposition filed by respondent's co-counsel, as well as in the opinion of the court of appeals (App. to Cert. Pet. 2a-4a), and will not be rehearsed here. Rather, counsel will note key aspects of the record omitted in the government's

"Statement" and will highlight various representations made by the government which tend to mischaracterize the record below.

The State of the Record

As a preliminary matter, it is useful to note the state of the record respecting prosecutorial vindictiveness. At the September 11 hearing on defendant's motion to dismiss, various representations -- basically in the form of oral proffers -- were made by counsel for the government, counsel for defendants and several pro se defendants respecting various matters. See Transcript of Proceedings of Sept. 11, 1985, United States v. Fitzgibon, et al., Nos. 85-329, 85-330, 85-331 (D.D.C. Sept. 11, 1985) (hereinafter 9/11/85 Tr.). [1] These representations tended to indicate a factual conflict regarding, e.g., whether the prosecutor informed defendants prior to September 11, 1985, that they still could exercise the forfeiture of collateral option, (compare 9/11/85 Tr. 17, 21, 25, 33-34, 37, 41, 42 with 9/11/85 Tr. 21, 33); whether, at a meeting on September 3, 1985, between the prosecutor, Mr. Ellenbogen and Ms. Jo Ellen Childers, a pro se defendant, the prosecutor threatened to seek substantial jail time for any defendant who was not willing to stipulate to the facts underlying the arrests (compare 9/11/85 Tr. 17-18, 43-44 with 9/11/85 Tr. 21); and whether and when any plea negotiations took place prior to the prosecutor's filing of the increased charges on May 29, 1985 (compare 9/11/85 Tr. 17, 24-25, 37, 40, 42, 44-46 with 9/11/85 Tr. 33).

Although both counsel for respondents and several pro se respondents indicated a willingness to present evidence to

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1 Due to the importance of an accurate understanding of the record in this case, counsel has attached a copy of the entire transcript of the hearing in the district court on September 11, 1985, as an appendix to respondent Daily's Brief in Opposition. Since the transcript, paginated 1-50, is similarly numbered in the appendix from 1a-50a, transcript citations in the brief are not referenced to the appendix.

support their claims, the district court asked the parties to make oral proffers, after which the court would determine whether it was necessary to put on witnesses. E.g., 9/11/85 Tr. 14, 38-39. Following the oral proffers of pro se defendants Judith Hand, Judith Hearn and Mindy Washington, the district court inquired of the prosecutor:

> THE COURT: Is this factually accurate? Do you want me to put people on the stand and take testimony under oath or are these representations made accurate?
>
> MR. McDANIEL: I am satisfied with the representations, Your Honor.
>
> 9/11/85 Tr. 46-47.

The government thus accepted the accuracy of the proffers of defendants and defense counsel regarding, inter alia: the non-existence of any plea bargaining prior to filing of the two-count information on May 29, 1985, (see 9/11/85 Tr. 17, 24-25, 33, 41, 42, 44-46); the absence of any notice to defendants that failure to forfeit collateral by May 29, 1985, would result in the filing of an additional count; and that, prior to the September 11 hearing, defendants had not been informed by the government that forfeiture of collateral was still available as an option (see 9/11/85 Tr. 41); and that after institution of the added charge, the prosecutor had threatened pro se defendant Childers that he would seek substantial jail time against those defendants who would not stipulate to the facts of the government's case (see 9/11/85 Tr. 17-18, 43-44).

Material Omissions or Misleading Assertions of Fact

The government's "Statement" also omits several key facts in its recitation of the facts and proceedings below. Awareness of these omitted facts is crucial to a proper understanding of the record and questions presented in this case.

First, the government fails to acknowledge that, prior to filing the first of the two-count informations against respondents on May 29, 1985, the prosecutor had been informed on

May 15, 1985, by Mr. Ellenbogen, counsel for several of the defendants, that many of the defendants intended to proceed to trial and raise first amendment and other defenses. 9/11/85 Tr. at 16, 37.

Second, during the period between the arrest on April 22, 1985, and the filing of the first tier of two-count informations, no plea bargaining had taken place. 9/11/85 Tr. 33, 42. The sole government-defendant communication during this period was the May 15, 1985, meeting involving the magistrate's office, the Assistant U.S. Attorney and Mr. Ellenbogen, which was precipitated by the failed attempt to arraign the defendants. 9/11/85 Tr. 15. No plea negotiations occurred at this meeting. 9/11/85 Tr. 33, 37. Nor did the prosecutor discuss the forfeiture of collateral option. 9/11/85 Tr. 33.

The government does not indicate that there were three separate arraignment dates set: May 29, June 21 and June 28, 1985. No plea bargaining occurred at all until the June 21 arraignment, where the government extended an offer available only for that day. 9/11/85 Tr. 33, 42. A similar offer was extended at the third arraignment on June 28, 1985. The government did not indicate at any of the arraignments that the forfeiture of collateral option remained open. 9/11/85 Tr. 42. In fact, respondent Childers indicated that the defendants' understanding was that "once I entered a not guilty plea, if I chose to change that plea to guilty or nolo, that my sentence would be at the discretion of the court and not that I could pay $50 and be done with it." 9/11/85 Tr. 42. The record indicates that September 11 was the first time that the prosecutor indicated to respondents that the forfeiture of collateral option remained open up to the moment of trial. 9/11/85 Tr. 33.

Third, the government does not reveal that during a pretrial conference on September 3, 1985, the prosecutor made a statement

to respondent Childers in which the prosecutor "did indeed threaten myself and the other pro se defendants in the case if we would not stipulate to the facts in the case . . . " 9/11/85 Tr. 43. See also 9/11/85 Tr. 17-18 (proffer of Mr. Ellenbogen).

Fourth, the government in several instances represents that the charge was increased only "after a representative of the United States Attorney's office first examined the case, which occurred only after respondents had been arrested on the initial misdemeanor charge and had decided to stand trial." Pet. for Cert. at 4. Yet the record does not indicate any precise point in time when any particular member of the U.S. Attorney's office first became involved in events regarding respondents' arrest. [2] Nor is there evidence that any actual reevaluation of the societal interests in the case prompted the prosecutor to add a charge. [3]

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Had the government proffered evidence that a prosecutor normally is uninvolved in the determination of the initial charge in petty offenses arising from a large demonstration, respondents would have proffered evidence that, in the experience of several defense attorneys with substantial experience representing demonstrators in the District of Columbia [including counsel herein, see e.g., United States v. Grace, 461 U.S. 171 (1983)], in most mass demonstration cases, a member of the U.S. Attorney's office is involved in the pre-charging decision process.

Arrest reports provided to defense counsel prior to trial affirmatively indicate that solicitors from the Department of the Interior (who provide advise to the United States Park Police and the National Park Service, which has jurisdiction over the White Hose sidewalk) were present at the demonstration. See App. 51a-53a.

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The only proffered explanation for the prosecutor's motive in increasing the charge was stated hypothetically. After conceding that new additional information had prompted his action, the prosecutor argued that "[t]he recognition of which legal theory the government wished to proceed on was a different matter. That is something that required a certain amount of contemplation and analysis by members of the United States Attorney's Office and that was motivated, I would suggest, solely by a balancing of the societal interests in controlling unruly demonstrations and the relative gravity of this particular offense given its effect upon the community." 9/11/85 Tr. 21 (emphasis added).

Fifth, on July 30, 1985, Mr. Ellenbogen filed pre-trial motions, including a motion for trial by jury (based on the potential aggregated sentence resulting from the added charge) and a motion to dismiss on grounds of prosecutorial vindictiveness. On September 6, 1985, the district court granted the jury trial motion and set the other issues for argument prior to trial, scheduled to commence on September 11, 1985.

With respect to the district court's ruling, the government fails to indicate that the district court found that no plea bargaining had occurred prior to the time the government filed the second charge on May 29. 9/11/85 Tr. 33. Further, the district court found that no new information had come to the prosecutor's attention since the arrests in April. 9/11/85 Tr. 20-21; see Pet. for Cert. at 4 n. 3. The government does note the district court's finding that respondents never received notice that failure to forfeit collateral would result in an additional charge, id. at 5, but then omits mentioning that the district court, based on the facts presented, made an express finding that "in the exercise of your right to have a jury trial, the government upped the ante . . ." 9/11/85 Tr. 50. The district court found that, "[i]n the sequence of events, it is obvious that the only reason that the two counts came out as they did was that they had elected to go to trial . . ." 9/11/85 Tr. 27.

Finally, in discussing the decision of the court of appeals, the government does not recognize that the foundation of the court's ruling was its view that, while a presumption of vindictiveness ordinarily does not arise in a pretrial setting, where the evidence rises to the level of posing a realistic likelihood of vindictiveness, a rebuttable presumption of vindictiveness may lie. See App. to Cert. Pet. at 7a.

ARGUMENT

The court of appeals disposition of this case is consistent both with this Court's precedent and with decisions from other courts of appeals applying the doctrine of prosecutorial vindictiveness in the pretrial setting. The circuit court's conclusion that, in the unique circumstances of this case, respondents demonstrated a sufficiently realistic likelihood of vindictiveness to justify a presumption of prosecutorial vindictiveness, does not conflict with this Court's decision in United States v. Goodwin, 457 U.S. 368 (1982). Even if the court of appeals erred in concluding that a presumption of vindictiveness was merited in the case, the finding of actual vindictiveness by the district court provides an alternative ground for affirming the judgment below which would avoid the necessity of deciding the first question presented in the government's petition for certiorari. Further, the circuit courts of appeals are not in conflict on the question whether an "untainted" charge can be dismissed as a remedy to a finding of vindictiveness. The consensus of the courts is that the appropriate remedy is a matter for the sound discretion of the trial court, subject to review for abuse of discretion.

I. THE DECISION BELOW DOES NOT DEPART FROM THE COURT'S PROSECUTORIAL VINDICTIVENESS JURISPRUDENCE

A. Goodwin Does Not Preclude Applying a Rebuttable Presumption of Prosecutorial Vindictiveness at the Pretrial Stage Where Objective Evidence Indicates A Realistic Likelihood of Vindictiveness

The government argues that certiorari should be granted because the court of appeals fundamentally misread Goodwin, supra, and misapplied the Court's vindictive prosecution jurisprudence. Upon analysis, however, it is the government who argues for a major departure from both precedent and reason: asserting that Goodwin precludes a pretrial presumption of

vindictiveness under any circumstances; and, that, given a finding of vindictiveness, a district court is without power to dismiss the initial charge, regardless of the circumstances.

As the court of appeals recognized, Goodwin did not establish a per se rule rejecting the application of a pretrial presumption of vindictiveness in every case. See App. to Cert. Pet. 6a-7a. Rather, Goodwin held that a presumption of vindictiveness was not appropriate given the record in that case where, subsequent to the break down of plea negotiations and defendant's election for a jury trial -- and, in the absence of any evidence of actual vindictiveness -- the government filed more serious charges. 457 U.S. at 382-84. As will be further demonstrated below, Goodwin differs substantially from the instant case where no plea negotiations occurred prior to the filing of the added charge and where the indicia of prosecutorial vindictiveness prompted a finding of actual vindictiveness by the district court. See 9/11/85 Tr. 50.

The Court in Goodwin did indicate that "[t]here is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting;" 457 U.S. at 381 (emphasis added). The Court noted, for example, that, while preparing a case for trial, a prosecutor might uncover additional information or come to realize the case has a broader societal significance. Id.

Since Goodwin did not proffer any evidence of actual vindictiveness, the Court noted that it could find vindictiveness "only if a presumption of vindictiveness -- applicable in all cases -- is warranted." Id. The government views the Court's refusal to apply an "inflexible" presumption "in all cases" arising in the pretrial context as equivalent to a holding that courts must apply an "inflexible" presumption against vindictiveness "in all cases" in the pretrial setting. The

government's interpretation is both strained and fundamentally at odds with the concerns which undergrid the doctrine of prosecutorial vindictiveness.

Regardless of the particular procedural context of a criminal prosecution, the Court's central inquiry in determining whether or not to apply a presumption of vindictiveness consistently has focused upon whether circumstances exhibit a realistic likelihood of vindictiveness. The Goodwin Court reaffirmed the statement in Blackledge v. Perry, 417 U.S. 21 (1978), that "[t]he lesson that emerges from [North Carolina v.] Pearce [395 U.S. 711 (1969)], Colton [v. Kentucky, 407 U.S. 104 (1972)], and Chaffin [v. Stynchombe, 412 U.S. 17 (1973)] is that the Due Process Clause is not offended by all possibilities of increased punishment . . ., but only by those that pose a realistic likelihood of 'vindictiveness.'" 417 U.S. at 27.

The court of appeals did not depart from this approach. Rather, it reasoned that a defendant may demonstrate prosecutorial vindictiveness either by a showing of "actual vindictiveness," which the Goodwin Court expressly recognized, 457 U.S. at 380-81, 384 & n.19, or where circumstances indicate a realistic likelihood of vindictiveness. See App. to Cert. Pet. 5a-6a. The court observed that, "when the facts indicate a 'realistic likelihood of 'vindictiveness[,]' a presumption will arise obliging the government to come forward with objective evidence justifying the prosecutorial action." See App. to Cert. Pet. 6a, citing Blackledge v. Perry, 417 U.S. 21, 27-29, 29 n.7 (1974). The panel below continued:

> If the government produces such evidence, the defendant's only hope is to prove that the presumption is pretextual and that actual vindictiveness has occurred. But if the government fails to present such evidence, the presumption stands and the court must find that the prosecutor acted vindictively.
>
> App. to Cert. Pet. 6a.

Other courts of appeals also have recognized that a presumption of vindictiveness will lie in the pretrial setting where sufficient facts are presented to show a realistic likelihood of vindictiveness. See United States v. Krezdorn, 718 F.2d 1360, 1364-65 (5th Cir. 1983), cert. denied, 465 U.S. 1066 (1984); United States v. Gallegos-Curiel, 681 F.2d 1164, 1167-69 (9th Cir. 1982).

The government also asserts that recent cases subsequent to Goodwin counsel against applying a presumption of vindictiveness in the pretrial context, citing Thigpen v. Roberts, 468 U.S. 27, 30 n.4 (1984) and Texas v. McCullough, 106 S.Ct. 976 (1986). Actually, these cases undermine the government's argument.

The cited statement in Thigpen is merely a cryptic reference to the general thrust of Goodwin and notes that Goodwin distinguished Blackledge both in the timing of the enhanced charge and in the increased burden to the State of retrying the case a second time. 468 U.S. at 30 n.4. As will be seen in section I (B), infra, the burden of prosecuting the instant cases was considerably greater than the ordinary burden involved in a typical criminal case.

In McCullough, the Court reaffirmed that the question whether a presumption of vindictiveness arises in any setting depends upon whether there is a "realistic motive for vindictive[ness]." 106 S.Ct. at 980. Where the trial judge granted McCullough's motion for a new trial based on prosecutorial misconduct and McCullough, upon retrial, requested that the same judge resentence him, the Court found the circumstances insufficient to justify a presumption of vindictiveness. Id. at 979. Even through McCullough arose in a post-conviction setting, where a presumption generally applies, the Court found that "[t]he facts of this case provide no basis for a presumption of vindictiveness." Id.

A proper reading of the cases teaches that, whatever the context, a presumption of vindictiveness will lie only if a realistic likelihood of vindictiveness appears on the facts of the case. The difference between the pretrial and post-trial setting is that, in the former situation, a presumption generally will not lie while, in the latter context, a presumption generally will be recognized. Admittedly, the concerns articulated in Goodwin make it more difficult to show a realistic likelihood of vindictiveness in a pretrial setting, but the Court did not forever foreclose the possibility that, in an appropriate case, a presumption of vindictiveness will lie.

B. The Court of Appeals Correctly Determined That Respondents' Proffered Evidence Established a Realistic Likelihood of Vindictiveness

The government argues that the case at bar is controlled by the holding and rationale of Goodwin. This argument hinges on the government's contention that the added charge merely arose from a "form of plea bargaining codified by rule of court." Pet. for Cert. at 9. In the government's view, the initial option of forfeiture of collateral, indicated on the violation notice, was the functional equivalent of the "give and take" of plea bargaining; therefore, the different treatment accorded defendants who forfeited collateral, as compared to those who elected to exercise their right to trial, was "an inevitable (and permissible) result of plea bargaining and raises no due process issue." Id.

The government's argument, while deserving high marks for creativity, is not persuasive. Rather, it represents the government's best effort to bring this case within the contours of Goodwin, which arose in the plea bargaining context. In light of the district court's finding that no plea bargaining transpired in this case prior to the increase in charges, 9/11/85 Tr. 33, neither Goodwin nor Bordenkircher v. Hayes, 434 U.S. 357

(1978), precludes application of a pretrial presumption of vindictiveness in the unique circumstances of this case.

The simple fact is that the increase in charges did not arise following any plea negotiation. 9/11/85 Tr. 17, 24-25, 33, 37, 40, 42, 44-46. The first time a plea agreement was offered was at the second arraignment, on June 21, 1985. 9/11/85 Tr. 33 (Ellenbogen), 42 (Hand). Nor had any notice been provided to respondents that failure to forfeit collateral prior to arraignment would result in an increase in charges. Unlike the defendant in Bordenkircher, prior to filing the increase in charges, there had been neither "give and take" between respondents and the prosecutor nor any communication respecting the continued availability of the forfeiture of collateral option (or the consequences of failing to exercise the forfeiture option). Indeed, respondents' understanding was that forfeiture of collateral only remained open prior to entry of a not guilty plea at arraignment. See 9/11/85 Tr. 42 (Childers). In any event, once respondents had exercised their election for trial in the district court, the forfeiture of collateral option arguably expired by operation of law. [4]

In many ways, Goodwin is representative of many criminal cases. The offense charged involved common criminal behavior and did not arise from arguably constitutionally protected conduct; some plea negotiations transpired; and, most importantly, the government actually reevaluated the charges based both on

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[4] The Local Rule governing forfeiture of collateral, by its terms, is limited to cases currently before the magistrate. Local Rule 505(d) provides:

> In accordance with Rule 4(a) of the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates, the magistrate may in suitable types of misdemeanor cases accept payment of a fixed sum in lieu of appearance. . . .
>
> Local Rules of the United States District Court for the District of Columbia 505(d) (1987) (emphasis added).

additional information (including Goodwin's failure to appear on the charges for over three years) and a balancing of the societal interest in prosecution. See 457 U.S. at 371 n.2. Given the underlying conduct at issue (which involved assault on a police officer and a high speed chase in an effort to elude arrest), combined with Goodwin's prior record of violent criminal behavior, the government's reevaluation of the appropriate charges was both credible and documented. [5] Further, preparation of the case for trial was not so burdensome as to justify a presumption of vindictiveness. Id. at 381. Moreover, the first prosecutor assigned to Goodwin's case was a special assistant who did not have authority to prosecute felonies. The only indicia of vindictiveness in Goodwin was the sequence of events: following failed plea negotiations and defendant's exercise of his right to a jury trial, the government filed enhanced charges. Unlike Bordenkircher, there had been no express threat that failure to plead guilty would result in a greater charge.

The Goodwin Court's discussion of Bordenkircher indicates that a prosecutor's decision to increase charges after an initial expectation that a defendant will plead guilty evaporates is not "punitive" within the meaning of "vindictiveness," 457 U.S. at 380 & nn. 11, 12, and does not, therefore, violate due process principles. Thus, "[a] charging decision does not levy an improper 'penalty' unless it results solely from the defendant's exercise of a protected legal right, rather than the prosecutor's normal assessment of the societal interest in the prosecution." 457 U.S. at 380 n.11.

Significantly, the district court in the case at bar expressly found that, "[i]n the sequence of events, it is obvious

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5 The prosecutor filed an affidavit detailing the government's rationale for filing enhanced charges. 457 U.S. at 371 n. 2.

that the only reason that the two counts came out as they did was that [respondents] had elected to go to trial . . ." 9/11/85 Tr. 27. As noted above, this is the precise evil that the doctrine of prosecutorial vindictiveness was designed to prevent. In light of the many facts distinguishing this case from Goodwin, both the district court and the court of appeals decisions are consistent with the Court's precedent.

As previously noted, the most obvious distinction is that in Goodwin, plea negotiations had occurred and failed prior to the increase in charges. Whether or not Goodwin was provided notice that his failure to plead guilty would result in enhanced charges, see 457 U.S. at 385 (Blackmun, J., concurring in the judgment); since Goodwin himself had initiated the plea discussion, id. at 371, the first prosecutor assigned to the case had a legitimate initial expectation that Goodwin would plead guilty in magistrate's court.

Here, however, nearly 200 people were arrested while demonstrating in front of the White House in protest of various policies of the Reagan administration that impacted on issues of jobs, peace and justice. In addition to the numerous United States Park Police officers on the scene, it also appears that attorneys from the Solicitor's Office of the Department of the Interior also were present and actively supervising and directing the U.S. Park Police. [6] As the similarity among various arrest

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[6] The "Criminal Incident" reports of the U.S. Park Police, provided to defense counsel prior to trial, uniformly indicate that "I heard U.S. Park Police Lt. M. Barrett, under the direction of Mr. R. Robbins - Solicitor/National Park Service, advise the defendant and the group that their permit was revoked and they would have to move or would be arrested." Criminal Incident Record regarding Lisa Tarver (Apr. 22, 1985), App. 51a. Two other sample reports are included in the appendix, each of which are substantially identical to the above. See Criminal Incident Record regarding Julie Lynn Sinai, App. 52a; Criminal Incident Record regarding Richard David Spener, App. 53a. Mr. Robbins, the DOI solicitor referred to, is often indicated as one of the authors of recent federal regulations governing demonstrative activities on the White House sidewalk and in

and incident reports indicates, from the outset, the law enforcement response to the demonstration was coordinated by government attorneys. See App. 51a-56a.

No additional information concerning either the respondents' conduct at the demonstration or any particular respondent came to the attention of the government prior to its increase in charges. 9/11/85 Tr. 21. Nor was there any evidence that particular members of the prosecutor's office in fact reevaluated the case on the basis of the "societal interest in controlling unruly demonstrations." Id. That possibility was merely suggested as a possible benign explanation for the increase in charges.

The prosecutor did learn on May 15, however, that approximately forty defendants, including many who intended to proceed pro se, desired to stand trial and raise first amendment and various other defenses. 9/11/85 Tr. 16, 37. [7] As the court of appeals noted, the government had a substantial stake in avoiding trial. App. to Cert. Pet. 10a. The burden of further proceedings facing the prosecutor here is more akin to the institutional burden cited as justification for the presumption applied by the Court in Blackledge and its progeny than to the relatively minimal and ordinary burden at issue in Goodwin. Unlike Goodwin, which involved but one defendant and one defense attorney; here the prosecutor faced a trial involving 36 defendants (many of whom were proceeding pro se) and two defense attorneys.

Lafayette Park. See e.g., 50 Fed. Reg. 33571, 33575 col. 1 (Aug. 20, 1985) (proposed regulations governing demonstrations in Lafayette Park).

7 Among the pretrial motions filed by respondents were motions requesting discovery, a jury trial and seeking dismissal based on, inter alia, defenses based on international law; common law "necessity"; various constitutional and other grounds; and a claim of vindictive prosecution. Memorandum and Order, United States v. Coleman et al., Nos. 85-363M, 85-404M, 85-421M (D.D.C. Sept. 6, 1985).

The court of appeals also found that the simple factual and legal context of the case cast doubt on the credibility of the prosecutor's speculation that members of the U.S. Attorney's office reconsidered the charges in light of the societal interest in controlling unruly demonstrations. App. to Cert. Pet. 9a; 9/11/85 Tr. 21. The government's proffered justification is also undermined by the prosecutor's action in dismissing the added charge on the day of trial.[8] If the prosecutor really was concerned with the societal interest in the case, he would have welcomed an opportunity to obtain a conviction of defendants from a representative sampling of the community.

The dismissal of the additional count was a key factor in convincing the court of appeals that the totality of circumstances indicated a realistic likelihood of vindictiveness in this case. App. to Cert. Pet. 9a-10a. This fact also was critical to Judge Silberman's decision to vacate the court of appeals initial order granting en banc reconsideration and reinstate the panel opinion. See App. to Cert. Pet. 35a.

The prosecutor's dismissal of the added charge undoubtedly was intended to avoid the further burden of a jury trial and to remove the taint of its alleged misbehavior by dismissing the added charge. The fact that the government's first action at the hearing on September 11, 1985, was to dismiss the second charge, 9/11/85 Tr. 2, highlights the government's effort to improve its chances of prevailing on the issue of vindictiveness. Having seen the writing on the wall, however, the government obviously was engaged in damage control, tying to prevent outright dismissal of the case.

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[8] On September 6, the trial court granted respondents' motion for a trial based on the aggregate penalty to which respondents were then subject, and also indicated that the issue of vindictive prosecution merited a hearing prior to trial.

There were other significant indicia of vindictiveness in the prosecutor's conduct prior to the September 11 hearing. At a meeting on September 3, 1985, involving Mr. Ellenbogen, respondent Childers and the prosecutor, apparently negotiations to stipulate to certain facts fell through, 9/11/85 Tr. 22, and, at some point, the prosecutor threatened Ms. Childers that he would seek jail time for those respondents who refused to stipulate to the facts. 9/11/85 Tr. 43-44.

Also, it must be emphasized that defendants were arrested in the context of the exercise of first amendment rights. The conduct which gave rise to respondents' arrest is substantially different than the ordinary criminal activity characteristic of Goodwin. Given respondent's protest against the policies of the current administration, it certainly is not inconceivable that the government harbored some animosity toward respondents. This is particularly true in the sense of the institutional bias of the government, which was the focus of the Court's concern in Blackledge and Thigpen. The government's various assertions that the first amendment context of the case is irrelevant to an examination of the indicia of vindictiveness (see 9/11/85 Tr. 32; Pet. for Cert. at 12 n.7) is a dangerous invitation to abandon well-settled doctrine that the government may not selectively prosecute an individual based solely on the person's exercise of a protected first amendment right. See Wayte v. United States, 470 U.S. 598 (1985).

II. NEITHER THE INITIAL AVAILABILITY OF FORFEITING A $50 COLLATERAL IN LIEU OF APPEARING ON THE CHARGE NOR THE PROSECUTOR'S RENEWED OFFER OF FORFEITURE DISPELLED THE LIKELIHOOD OF VINDICTIVENESS

The government argues that, because the government indicated at the September 11 hearing that respondents remained free to exercise the forfeiture of collateral option up to the moment of trial, Bordenkircher protected the prosecutor's conduct. Pet. for Cert. at 11. In Bordenkircher, however, the defendant was

presented with the option of pleading guilty or facing increased charges prior to the filing of the enhanced charge. Similarly, in Goodwin, plea negotiations had broken down before the prosecutor filed a felony indictment.

As noted above, the record does not support the government's apparent contention that the forfeiture of collateral option remained open to respondents after the arraignment in which they pleaded not guilty and elected to be tried in the district court. Also, as previously noted, the Local Rule implementing the forfeiture of collateral option indicates that collateral only can be forfeited only while the case is within the jurisdiction of the magistrate. See text, supra, at 12 & n.4.

Even assuming the prosecutor had the power to renew the forfeiture option, the offer was not renewed until after the charges had been increased. While a defendant may point to facts occurring after the increased charge has been filed as evidence of vindictiveness, the government may not "moot" a claim of vindictiveness by citing failed plea negotiations occurring after the government has "upped the ante," or by dismissing the added count in an effort to dispel the aura of vindictiveness.

The decision below is firmly rooted in the unique factual circumstances of this case; the impact and reach of its holding is narrow. The decision does not mark a radical departure from Goodwin or other precedent. For these reasons, the case does not present questions which are sufficiently compelling to warrant granting the government's petition.

III. IN LIGHT OF THE FINDING OF ACTUAL VINDICTIVENESS, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ENTIRE CASE

The government posits that a district court is without power to dismiss a charge "untainted" by vindictiveness where the "tainted" charge is dismissed on the government's own motion. Were the Court to adopt this position, the prosecutor would gain

a power inconsistent with statutory and constitutional restraints limiting the scope and nature of the government's prosecutorial powers. The court of appeals correctly concluded that the cases which the government cites do not support the government's limited view of the equitable powers of the district court. See App. to Cert. Pet. 13a-14a. The government has not cited any authority that squarely supports its position. Nor has the government offered any reason for such a radical emasculation of the inherent powers of the district courts.

Clearly, a district court must have available to it the remedy of dismissal where other options are either unavailable or incapable of fostering a sufficiently deterrent effect on the government. Stripped of authority to dismiss a case where circumstances demand an admittedly extreme remedy, district courts would lose the ability to enforce effectively the constraints which due process and equal protection impose on governmental conduct. The government's position also would undermine the essential principle that ours is a government of laws and not of men [and women]. See e.g., Oyler v. Boles, 368 U.S. 448 (1962) (prohibiting prosecution based on defendant's race or color); Berger v. United States, 295 U.S. 78 (1935).

The government also argues that a conflict exists among the circuit courts of appeals regarding dismissal as a remedy for prosecutorial vindictiveness. As respondent Hand notes in her Brief in Opposition, however, no such conflict exists. No other court has held that a district court abused its discretion in dismissing an information based on a finding of actual vindictiveness. Rather, the cases indicate that district courts must have latitude to fashion remedies sufficiently effective to ameliorate the harm to the institutional integrity of the administration of criminal justice occasioned by the prosecutor's misconduct.

The government does not indicate a sufficient basis upon which to overturn the district court's remedy of dismissal. Rather, the remedy chosen by the district court was well within its power and should not be reviewed by this Court.

IV. THE DECISION OF THE COURT BELOW WILL NOT IMPAIR THE EFFECTIVENESS OF THE FORFEITURE OF COLLATERAL SYSTEM

The government's dire predictions of the dangerous consequences of the decision below are purely speculative and too ephemeral to warrant review by this Court. As previously noted, government attorneys generally are present (as they apparently were in this case) during major demonstrations to supervise, direct and provide advice to the police. The notion that government attorneys do not provide any input into the initial charging decision when arrests result from a large demonstration is supported neither in the record nor by common sense.

Also, the government remains free to add charges should new information come to the prosecutor's attention that merits reexamination of the significance of the case. Most important, the government can proffer the objective bases for its decision to increase an initial charge. Only improper motivations in adding or instituting a charge subject the government to potential dismissal of a case. Where such an improper motivation is present, dismissal also inures to the public benefit.

Finally, there is a substantial question whether the forfeiture of collateral option is available once a defendant elects to be tried in the district court. See text, supra, at 12 & n.4. Thus, the government's entire argument may be constructed on a faulty premise. In the absence of any record evidence regarding the details of administration of the forfeiture of collateral system, the Court should be reluctant to decide issues which are premised on the government's conclusory representation

that the forfeiture of collateral option remained open to defendants through and until the moment of trial.

V. EVEN IF THE COURT OF APPEALS ERRED IN APPLYING A PRESUMPTION OF VINDICTIVENESS, THE DISTRICT COURT'S FINDING OF ACTUAL VINDICTIVENESS WOULD STILL REQUIRE AFFIRMANCE OF THE JUDGMENT BELOW

The court of appeals did not to reach the question whether the district court's finding of actual vindictiveness should be affirmed. The court did accurately identify the relevant standards of review, noting that the finding of vindictiveness could be overturned only if clearly erroneous and that dismissal of the information could be reversed only if the district court abused its discretion in ordering dismissal. See App. to Cert. Pet. 4a-5a.

Even if the Court agrees that the question whether a pretrial presumption of vindictiveness ever can be applied in a pretrial setting presents a substantial federal question, the Court need not reach that issue in this case because the district court premised its holding on a finding of actual vindictiveness. See 9/11/85 Tr. 27, 50. The Court in Goodwin expressly sanctioned the power of the district court to premise a finding of vindictiveness upon objective evidence of actual vindictiveness. 457 U.S. at 380 n.12, 384.

In light of the evidence proffered by respondents, the district court's finding was amply supported by the record and could not be characterized as clearly erroneous. In any event, the legal sufficiency of the district court's finding of vindictiveness and its subsequent dismissal of the information are questions which should be resolved by the court of appeals in the first instance. At most, the Court should remand the case to the court of appeals to resolve this issue.

CONCLUSION

The decision by the court of appeals did not depart from precedent of this Court or create a conflict with other courts of appeals addressing the question of the application of the doctrine of prosecutorial vindictiveness to the pretrial setting. Moreover, the district court's finding of actual vindictiveness provides a basis for affirming the judgment below which does not require resolution of the first question presented in the governments petition. Respondent Daily therefore urges the Court to deny the government's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)

V.) CRIMINAL NOS. 85-329
85-330
THERESA FITZGIBON, ET AL.,) 85-331

DEFENDANTS)

WASHINGTON, D.C.

SEPTEMBER 11, 1985

THE ABOVE-ENTITLED MATTER CAME ON FOR TRIAL BEFORE THE HONORABLE AUBREY E. ROBINSON, JR., CHIEF JUDGE, AT 9:45 A.M.

APPEARANCES:

ROBERT MC DANIEL, AUSA
FOR THE GOVERNMENT

DANIEL ELLENBOGEN, ESQ.
SEBASTIAN GRABER, ESQ.
FOR THE DEFENDANTS

DAWN T. COPELAND
OFFICIAL COURT REPORTER

PROCEEDINGS

THE DEPUTY CLERK: UNITED STATES OF AMERICA V. THERESA FITZGIBON, ET AL. CRIMINAL NOS. 85-329, 85-330. CRIMINAL NO. 85-331.

MR. ROBERT MC DANIEL FOR THE GOVERNMENT AND MR. DANIEL ELLENBOGEN AND SEBASTIAN GRABER FOR THE DEFENDANTS.

THE COURT: ARE YOU READY TO PROCEED?

MR. MC DANIEL: YES, YOUR HONOR.

THE COURT: MR. MC DANIEL.

MR. MC DANIEL: IF IT PLEASE THE COURT, I HAVE A NUMBER OF BRIEF PRELIMINARY MATTERS.

THE COURT: ALL RIGHT.

MR. MC DANIEL: FIRST, I WOULD ASK LEAVE OF THE COURT TO HAVE MISS JUNE THOMAS, A PARALEGAL EMPLOYED BY THE UNITED STATES ATTORNEY'S OFFICE, TO SIT WITH ME AT COUNSEL TABLE.

THE COURT: YES.

MR. MC DANIEL: I WOULD LIKE TO MOVE, IF IT PLEASE THE COURT, IN EACH OF THE INFORMATIONS, TO DISMISS COUNT ONE AND LEAVE REMAINING ONLY COUNT TWO IN EACH CASE.

THE COURT: DO YOU WANT TO BE HEARD ON THAT, MR. ELLENBOGEN.

MR. ELLENBOGEN: IF IT PLEASE THE COURT, I WOULD OBJECT TO THE GOVERNMENT'S WITHDRAWAL OF COUNT TWO OF THE INFORMATION INSOFAR AS IT SIMPLY IS AN EFFORT --

THE COURT: IT IS COUNT ONE.

MR. ELLENBOGEN: TO WITHDRAW COUNT ONE, EXCUSE ME.

I OBJECT TO THE GOVERNMENT'S DISMISSING THAT INSOFAR AS IT IS MOTIVATED SOLELY FOR THE PURPOSE OF DEPRIVING THE DEFENDANTS OF THEIR RIGHT TO A JURY TRIAL AS THIS COURT HAS ALREADY ORDERED.

TO THAT EXTENT, I WOULD ASK THAT THE GOVERNMENT NOT BE PERMITTED AT THIS LATE DATE TO DISMISS ONE OF THOSE COUNTS.

I WILL ADDRESS THE POINT FURTHER IN MY ARGUMENT ON THE ISSUE OF VINDICTIVE PROSECUTION.

THE COURT: MR. MC DANIEL.

MR. MC DANIEL: YOUR HONOR, I WOULD SUBMIT.

THE COURT: I DO NOT THINK IT IS THE PREROGATIVE OF THE COURT TO TELL THE GOVERNMENT WHETHER IT IS GOING TO PROCEED WITH A CRIMINAL PROSECUTION OR NOT.

I THINK I AM REQUIRED TO GRANT THE GOVERNMENT'S MOTION TO DISMISS.

THE MOTION IS GRANTED AS TO EACH DEFENDANT.

MR. MC DANIEL: MAY IT PLEASE THE COURT, YOUR HONOR, MY LAST PRELIMINARY MATTER IS TO DISMISS AGAINST SEVERAL OF THE INDIVIDUALS WHOSE NAMES I HAVE PROVIDED TO THE COURT CLERK.

THEY ARE, FOR THE RECORD, DEFENDANTS BABSON,

COHEN, GOANS, KLEIN, SNYDER, GROW AND SAWYER.

THE COURT: DO YOU HAVE THAT LIST?

MR. ELLENBOGEN: NO, YOUR HONOR. THIS IS THE FIRST I HAVE HEARD OF THAT.

THE COURT: THAT IS WHY WE HAVE A HEARING IN COURT. THAT IS NOT UNUSUAL.

I WILL ASK YOU TO REPEAT THE LIST.

MR. MC DANIEL: YES, YOUR HONOR.

THE NAMES ARE BABSON, B-A-B-S-O-N, COHEN, C-O-H-E-N, GOANS, G-O-A-N-S, KLEIN, K-L-E-I-N, SNYDER, S-N-Y-D-E-R, GROW, G-R-O-W AND SAWYER IS S-A-W-Y-E-R.

THE COURT: MR. ELLENBOGEN, DO YOU WANT TO MAKE A RECORD ON THAT, TOO?

MR. ELLENBOGEN: THAT IS DISMISSING THE REMAINING COUNT THAT IS LEFT IN THE INFORMATION, IF I UNDERSTAND IT?

MR. MC DANIEL: YES.

THE COURT: ALL RIGHT.

DO YOU WISH TO BE HEARD? STATE YOUR NAME.

MR. GOANS: MY NAME IS ARTHUR GOANS. I AM PRO SE IN THIS CASE AND I WOULD LIKE TO KNOW WHY HE IS DISMISSING THESE CHARGES AT THIS TIME.

THE COURT: EVEN I CAN'T ASK THE GOVERNMENT THAT.

MR. GOANS: ALL RIGHT.

THE COURT: THE GOVERNMENT PROSECUTES AND WE TRY.

WE CAN ONLY TRY WHAT THEY PROSECUTE.

MR. ELLENBOGEN: WE TRY ALSO, YOUR HONOR.

THE COURT: NOW, DON'T GET CUTE WITH ME. YOU DON'T TRY. YOU ARE A LAWYER REPRESENTING LITIGANTS.

MR. ELLENBOGEN: OK.

YOUR HONOR, THERE ARE FOUR INDIVIDUALS WHO I INITIALLY ENTERED APPEARANCES FOR AND AFTER DISCUSSION WITH THESE DEFENDANTS, IT IS THEIR INTENTION TO PROCEED PRO SE.

THE COURT: GIVE US THEIR NAMES, PLEASE.

MR. ELLENBOGEN: I ASK PERMISSION TO WITHDRAW FROM THIS CASE FOR THE DEFENDANTS MARGARET ARTEAGA, THERESE FITZGIBON, JUDITH HAND AND VIRGINIA SENDERS.

THE COURT: ARE EACH OF THOSE PERSONS HERE THIS MORNING, AND YOU CONCUR IN COUNSEL'S MOTION TO WITHDRAW AND YOU WISH TO PROCEED PRO SE?

IS THAT CORRECT?

MISS ARTEAGA: YES, YOUR HONOR.

THE COURT: ALL RIGHT. YOUR MOTION IS GRANTED.

MR. ELLENBOGEN: THANK YOU VERY MUCH, YOUR HONOR.

THERE IS ANOTHER PRELIMINARY MATTER BEFORE WE GET TO THE ISSUE OF VINDICTIVE PROSECUTION, YOUR HONOR.

I WOULD LIKE AT THIS POINT TO MAKE A GENERAL MOTION TO DISMISS BASED ON VARIOUS ABUSES BY THE GOVERNMENT IN TERMS OF PROVIDING COUNSEL WITH DISCOVERY IN THIS CASE.

TO DATE, UNDER THE RULES OF DISCOVERY. COUNSEL HAS NOT BEEN PROVIDED WITH COPIES OF THE PHOTOGRAPHS THAT THE GOVERNMENT INTENDS TO INTRODUCE AT TRIAL.

COUNSEL HAS NOT BEEN PROVIDED WITH COPIES OF ARREST RECORDS FOR ANY OF THE DEFENDANTS AND COUNSEL HAS ONLY JUST THIS MORNING BEEN PROVIDED WITH COPIES OF VIDEO-TAPES WHICH THE GOVERNMENT HAS ASSURED BOTH MYSELF AND YOUR HONOR AT THE PRETRIAL CONFERENCE THAT WE HAD IN JUNE THAT NO SUCH TAPES DID EXIST.

INITIALLY THE GOVERNMENT CAME ACROSS LAST WEEK AND YESTERDAY I WAS INFORMED THAT THERE WERE ADDITIONAL TAPES.

NOW, AT THIS POINT, I'VE NOT HAD AN OPPORTUNITY TO VIEW HALF OF THE VIDEOTAPE WHICH I EXPECT THE GOVERNMENT WILL SEEK TO INTRODUCE.

SINCE THE VIDEOTAPE WAS WITHIN THE CUSTODY OF THE PARK POLICE, I WOULD SAY THAT THE GOVERNMENT WAS UNDER AN OBLIGATION TO EXERCISE DUE DILIGENCE TO PRODUCE THAT . IN A TIMELY FASHION SO THAT THE DEFENDANTS COULD HAVE AN OPPORTUNITY TO EXAMINE IT, THIS INFORMATION, AND SO THEY COULD ADDRESS AT TRIAL -- THIS IS MAKING IT DIFFICULT TO ENTER INTO THE STIPULATIONS BY VIRTUES OF THIS AND I WOULD SUBMIT THAT THIS LATE DISCOVERY OF THE VIDEOTAPE CAUSES US A BIT OF UNDUE HARDSHIP IN TERMS OF A TWO AND A HALF MONTH PREPARATION OF CERTAIN DEFENSES WHICH WERE BROUGHT

TO THIS COURT'S ATTENTION IN JUNE AND WHICH ARE NOW OF QUESTIONABLE MERIT SINCE COUNSEL IN GOOD FAITH COULD NOT PRESENT THOSE AND THAT WOULD NOT HAVE BEEN NECESSARY TO CONTINUE THIS CASE BACK IN JULY HAD THE INFORMATION BEEN PROVIDED.

SO IN TERMS OF THE FACT THAT THE GOVERNMENT HAS NOT PROVIDED ANY OF THE INFORMATION THAT IS REQUIRED -- THAT IT IS REQUIRED TO PROVIDE UNDER RULE 16 OF THE RULES OF DISCOVERY, I WOULD ASK THIS COURT FOR IMPOSITIONS OF SANCTIONS.

FIRST, I WOULD ASK THAT THE INFORMATION -- THAT THE REMAINING COUNT BE DISMISSED AND ADDITIONALLY, THERE ARE ARREST REPORTS PROVIDING PROBABLE CAUSE FOR THIS PROSECUTION AND THOSE HAVE NOT BEEN PROVIDED.

EXCUSE ME. LET ME CORRECT THAT. ARREST REPORTS HAVE ONLY BEEN PROVIDED FOR EIGHT DEFENDANTS.

THERE HAS BEEN AN ONGOING CONTINUING PROMISE BY THE GOVERNMENT TO PROVIDE THEM BUT IT HAS JUST BEEN AN EMPTY PROMISE.

SO I WOULD ASK YOUR HONOR IN THE COURT'S DISCRETION BY VIRTUE OF THE HARDSHIP THAT THIS IS IMPOSING ON COUNSEL --

THE COURT: I AM NOT CLEAR AS TO WHAT YOU ARE SAYING ABOUT ARRESTS. YOU SAID ARREST RECORDS?

MR. ELLENBOGEN: YES. ARREST RECORDS AND ARREST REPORTS.

THE COURT: NOW, WHAT ARREST RECORDS ARE YOU TALKING ABOUT?

MR. ELLENBOGEN: I HAVE REASON TO BELIEVE THAT THE GOVERNMENT MAY SEEK TO INTRODUCE ARREST RECORDS FOR DEFENDANTS --

THE COURT: YOU ARE TALKING ABOUT IN OTHER CASES?

MR. ELLENBOGEN: YES, AS OPPOSED TO THIS CASE.

THE COURT: NOW, DO YOU HAVE SOMETHING ELSE IN CONNECTION WITH ARREST RECORDS?

MR. ELLENBOGEN: NO, BUT THE ARREST REPORTS THAT WERE INITIALLY LODGED.

THE COURT: IN THIS CASE?

MR. ELLENBOGEN: IN THIS CASE.

THE ARREST REPORTS THAT THE OFFICERS MADE AT THE TIME OF THE ARREST AND THAT INFORMATION HAS NOT BEEN PROVIDED.

THE PHOTOGRAPHS THE GOVERNMENT ASSURED ME DID EXIST AND THE GOVERNMENT SEEKS TO USE IN ITS CASE IN CHIEF AGAINST THE DEFENDANTS, THE DEFENDANTS I AM REPRESENTING AND THE DEFENDANTS THAT ARE PROCEEDING PRO SE, HAVE NOT BEEN MADE AVAILABLE FOR INSPECTION OR COPYING.

THE VIDEOTAPE, I THINK THAT SPEAKS TO ITSELF, YOUR HONOR.

I WOULD ASK IN LIGHT OF THIS THAT THIS COURT EXERCISE ITS DISCRETION AND DISMISS THE REMAINING COUNT

IN THE INFORMATION.

I DON'T THINK A CONTINUANCE IS AN APPROPRIATE REMEDY GIVEN THE HARDSHIP IT IS GOING TO IMPOSE ON EVERYONE HAVING TO COME BACK AGAIN AND IN THE ALTERNATIVE, YOUR HONOR, IF YOU WILL NOT DISMISS THE REMAINING COUNT BECAUSE OF THIS ABUSE OF DISCOVERY, I WOULD ASK THE COURT TO ENTER AN ORDER PRECLUDING THE GOVERNMENT FROM USING EITHER THE VIDEOTAPE, THE PHOTOGRAPHS OR THE ARREST REPORTS IN ITS CASE IN CHIEF, AND I ASK THAT THAT EVIDENCE BE SUPPRESSED.

THE COURT: ALL RIGHT.

MR.MC DANIEL?

MR. MC DANIEL: IF IT PLEASE THE COURT, THE GOVERNMENT WOULD TAKE EXCEPTION TO THE REPRESENTATION THAT IT HAS FAILED TO PROVIDE ANY INFORMATION PURSUANT TO DISCOVERY.

A NUMBER OF DISCOVERY CONFERENCES WERE HELD WHERE THE CONTENTS OF EACH AND EVERY ARREST REPORT WAS DESCRIBED IN DETAIL.

COUNSEL FOR THE DEFENDANTS WAS ADVISED THAT THESE ARREST REPORTS WOULD VARY ONLY IN THE RESPECT OF THE DEFENDANT'S NAME.

WITH RESPECT TO THE ARREST RECORDS, THE GOVERNMENT DOES NOT INTEND TO INTRODUCE ANY EVIDENCE OF ANY PRIOR ARRESTS ON THE PART OF ANY INDIVIDUAL.

WITH REGARD TO THE PHOTOGRAPHS THAT WERE TAKEN BY THE POLICE FOR PURPOSES OF IDENTIFICATION, THE GOVERNMENT

DOES NOT INTEND TO INTRODUCE THAT IN ITS EVIDENCE IN ITS CASE IN CHIEF AND WITH RESPECT TO THE VIDEOTAPE, ALL VIDEOTAPES THAT WERE KNOWN TO EXIST BY THE UNITED STATES ATTORNEY'S OFFICE WERE PRODUCED IN A MEETING BETWEEN MYSELF, MISS JUNE THOMAS, COUNSEL FOR THE DEFENDANTS AND JO ELLEN CHILDERS WHO WAS REPRESENTING HERSELF ON AN AFTERNOON LAST WEEK AND THEY WERE GIVEN UNLIMITED TIME TO VIEW THE APPROXIMATELY ONE HOUR OF VIDEOTAPE THAT WAS AVAILABLE TO US AT THAT POINT AND COPIES WERE SUBSEQUENTLY MADE BY THE U.S. PARK POLICE AND TURNED OVER TO MR. ELLENBOGEN.

YESTERDAY, YOUR HONOR, THE GOVERNMENT DISCOVERED THE EXISTENCE OF FOUR ADDITIONAL PIECES OF VIDEOTAPE. I HAVE HAD THOSE COPIES AND I CAN ONLY CONFESS THAT WE WERE ONLY ABLE TO PROVIDE THEM JUST THIS MORNING TO MR. ELLENBOGEN AND I RECOGNIZE THE DIFFICULTIES THAT THAT PRESENTS.

I CAN REPRESENT TO THE COURT THAT THE REASON WHY THOSE WERE NOT PRODUCED EARLIER IS SIMPLY BECAUSE THEY WERE OVERLOOKED BY THE OFFICIALS OF THE UNITED STATES PARK POLICE.

THE COURT: MR. ELLENBOGEN?

MR. ELLENBOGEN: YES, YOUR HONOR. TO THE CONTRARY TO WHAT THE U.S. ATTORNEY IS REPRESENTING, HE DID ASSURE ME THAT CONTENTS OF REPORTS MAY HAVE BEEN SIMILAR BUT THE EIGHT REPORTS -- THE ARREST REPORTS THAT I HAVE BEEN PROVIDED, THERE ARE NO TWO OF THEM THAT READ IDENTICAL.

I HAVE NO REASON TO BELIEVE THAT THE REMAINING 39 OR 45 OR HOW MANY THERE ARE ARE GOING TO ALSO BE IDENTICAL.

THE COURT: ARE THEY AVAILABLE NOW?

MR. MC DANIEL: THEY ARE, YOUR HONOR.

MR. ELLENBOGEN: IN ADDITION, YOUR HONOR, I WOULD POINT OUT THAT RULE 16 DOES NOT REQUIRE THE UNITED STATES -- THE U.S. ATTORNEY TO PROVIDE INFORMATION THAT IS SOLELY IN THE POSSESSION OF THE U.S. ATTORNEY BUT INFORMATION THAT IS IN THE CUSTODY OR CONTROL OF THE GOVERNMENT, THE EXISTENCE OF WHICH IS KNOWN OR BY THE EXERCISE OF DUE DILIGENCE MAY BECOME KNOWN TO THE ATTORNEY FOR THE GOVERNMENT AND THAT IS READING DIRECTLY FROM THE RULES, YOUR HONOR.

I WOULD POINT OUT THAT WE HAD A CONFERENCE IN CHAMBERS IN JUNE WHERE WE DISCUSSED THE PRESENCE OF VIDEO-TAPES AND THE U.S. ATTORNEY HAD REPRESENTED THAT HE HAD MADE INQUIRY OF THE PARK POLICE AND WAS TOLD THAT NO SUCH TAPE EXISTED.

THE COURT: MR. ELLENBOGEN, LET'S NOT GO BACK TO NOAH'S ARK.

THE FACT IS THAT SOME VIDEOTAPE WAS PRODUCED. IS THAT CORRECT?

MR. ELLENBOGEN: SOME.

THE COURT: ALL RIGHT. SOME. YOU DIDN'T EVEN ACKNOWLEDGE THAT IN YOUR INITIAL PRESENTATION.

MR. ELLENBOGEN: YES, I DID.

THE COURT: NO, YOU DIDN'T. YOU SAID YOU DID NOT HAVE VIDEOTAPE DISCOVERY. THAT IS WHAT YOU TOLD ME.

SO YOU HAVE HAD SOME VIDEOTAPE DISCOVERY AND NOW THE QUESTION IS, WHAT DO WE DO ABOUT THESE PORTIONS THAT ALLEGEDLY JUST APPEARED YESTERDAY. THAT IS THE QUESTION, IS IT NOT?

MR. ELLENBOGEN: YES, AND THE INFERENCE IS TO WHAT OTHER INFORMATION MAY BE ALSO AVAILABLE.

THE COURT: WELL, I TELL YOU, IF WE WAIT LONG ENOUGH, THERE MAY BE A WHOLE LOT OF STUFF THAT TURNS UP IF WE CONTINUE THE INVESTIGATION FOR ANOTHER SIX, EIGHT, TEN OR FOURTEEN MONTHS. THAT HAPPENS INEVITABLY IN A CRIMINAL PROSECUTION AND YOU CAN GO AND INVESTIGATE AND INVESTIGATE AD INFINITUM.

YOU DID SEE A CONSIDERABLE PORTION OF WHAT THEY SAID THEY HAD AT THAT TIME AND THE QUESTION IS WHAT ABOUT THE OTHER TAPES THEY HAVE.

THERE ARE TWO WAYS TO HANDLE THAT, EITHER EXCLUDE IT OR GIVE YOU THE OPPORTUNITY TO LOOK AT IT BECAUSE IT MAY PROVE BENEFICIAL AT THIS JUNCTURE IN CONNECTION WITH THE DEFENSE'S CASE.

WHAT DO YOU WANT TO DO?

MR. ELLENBOGEN: I WOULD ASK THAT IT BE EXCLUDED, YOUR HONOR.

THE COURT: WHAT IS YOUR PROBLEM WITH THAT?

MR. MC DANIEL: YOUR HONOR, I DO NOT OBJECT TO THE EXCLUSION OF THAT.

THE COURT: THAT IS EXACTLY RIGHT. DON'T WORRY ABOUT WHAT YOU HAVE NOT SEEN.

WHEN IT COMES TO THE ARREST RECORDS, THE ARREST RECORDS ARE NOT THAT LONG OR DETAILED, ARE THEY?

I WILL GIVE YOU THE OPPORTUNITY TO LOOK AT THE ARREST RECORDS OF EVERY INDIVIDUAL BEFORE THE CONCLUSION OF THE TRIAL. YOU CAN MAKE OUT OF THEM WHAT YOU WILL IN CONNECTION WITH YOUR CROSS-EXAMINATION OF ANY GOVERNMENT WITNESSES.

MR. ELLENBOGEN: FINE.

I WOULD ALSO LIKE TO ASK A BIT OF CLARIFICATION. SO THE GOVERNMENT DOES NOT INTEND TO INTRODUCE PHOTOGRAPHS AS EVIDENCE, AND THE FACT THAT THOSE HAVE NOT BEEN MADE AVAILABLE FOR INSPECTION OR COPYING AS THE RULES REQUIRE, THAT THE GOVERNMENT BE PRECLUDED FROM USING THOSE IN ANY CAPACITY.

THE COURT: THERE IS NO QUESTION ABOUT THAT. THE GOVERNMENT HAS REPRESENTED THAT IT HAS NO INTENTION OF USING THEM.

IS THAT CORRECT? ARE THOSE PHOTOGRAPHS AVAILABLE?

MR. MC DANIEL: THEY ARE.

THE COURT: THEN THEY SHOULD BE MADE AVAILABLE TO THE DEFENDANTS FOR WHATEVER USE THEY MAY CHOOSE TO MAKE OF THEM.

MR. ELLENBOGEN: THANK YOU, YOUR HONOR.

THE COURT'S INDULGENCE?

THE COURT: YES.

MR. ELLENBOGEN: MAY IT PLEASE THE COURT, I AM READY TO PROCEED ON THE ARGUMENT FOR VINDICTIVE PROSECUTION.

THE COURT: ALL RIGHT.

MR. ELLENBOGEN: I WOULD LIKE TO FIRST REITERATE FOR THE RECORD AS IT HAS ALREADY BEEN PRESENTED IN THAT MOTION.

THE GOVERNMENT AT THIS JUNCTURE NOW HAS THE BURDEN OF GOING FORWARD TO PROVE -- TO ESTABLISH THAT SUCH PROSECUTION HAS NOT BEEN VINDICTIVE.

HOWEVER, I AM ALSO PREPARED TO INTRODUCE AND PUT ON TESTIMONY AND SUBMIT EVIDENCE TO FURTHER BOLSTER THE CLAIMS THAT THIS IS FOR VINDICTIVE PROSECUTION AND SO IF YOUR HONOR WISHES --

THE COURT: LET ME HEAR YOUR ARGUMENT AND THEN WE WILL DETERMINE WHETHER OR NOT THERE IS AN EVIDENTIARY REQUIREMENT NEEDED TO BUTTRESS YOUR ARGUMENT.

MR. ELLENBOGEN: THE ARGUMENT IS THAT BASICALLY THE GOVERNMENT'S ACTION IN DECIDING TO PROSECUTE INITIALLY FOR AN EXERCISE OF FIRST AMENDMENT RIGHTS GIVE RISE TO A CLAIM OF A VINDICTIVE PROSECUTION IN TERMS OF THE INITIAL INFORMATION THAT WAS FILED.

THE GOVERNMENT IN THIS TWO COUNT INFORMATION,

WHICH INFORMATION WAS FILED AFTER -- IF I COULD BACKTRACK FOR A MOMENT AND DO THIS CHRONOLOGICALLY.

THE COURT: I THINK YOU HAVE TO BECAUSE THAT IS THE ESSENCE OF THE CLAIM.

MR. ELLENBOGEN: ON MAY 15TH, THE DATE INITIALLY SCHEDULED FOR THE APPEARANCES AT TRIAL, IT BECAME RATHER OBVIOUS TO EVERYONE INVOLVED THAT THE GOVERNMENT HAD FAILED TO PROVIDE ADEQUATE NOTICE TO THE DEFENDANTS TO APPEAR FOR THAT ARRAIGNMENT -- FOR THAT APPEARANCE.

AT A MEETING HELD BETWEEN MYSELF, REPRESENTATIVES OF THE CLERK'S OFFICE AND MAGISTRATE DWYER'S CHAMBERS, WE RESOLVED TO ESTABLISH A THREE-TIERED ARRAIGNMENT SCHEDULE.

AT THE MAY 15TH MEETING, THE GOVERNMENT HAD NO INFORMATION AVAILABLE TO PRESENT OR FILE AGAINST PEOPLE.

MAY 28, WHICH WAS THE FIRST DAY OF THE ARRAIGNMENTS, THE GOVERNMENT ALL OF A SUDDEN FILED AN INFORMATION THAT ALLEGED TWO COUNTS, TWO VIOLATIONS.

AT THAT POINT IT BECAME RATHER -- THOSE DEFENDANTS WHO APPEARED ON THE 29TH, WERE NEVER ADVISED THAT THE TWO CHARGES HAD BEEN LODGED AGAINST THEM AND MANY OF THEM WERE RATHER SURPRISED AND UPSET THAT TWO COUNTS HAD BEEN LODGED TO THAT EFFECT.

NOW, IT APPEARS THAT THE SIMPLE BASIS FOR THE TWO COUNTS WAS NOT TO ACHIEVE ANY LEGITIMATE PROSECUTORIAL END BUT IT WAS OBVIOUS TO THE GOVERNMENT AFTER THE MAY

15TH MEETING THAT THE PEOPLE WERE GOING TO COME TO COURT AND WERE GOING TO CHALLENGE THE ARRESTS AND MAKE THE GOVERNMENT PROVE THEIR CASE AGAINST THEM.

IT IS FOR THAT REASON, THEIR EXERCISE OF THEIR RIGHT TO TRIAL, THAT THE GOVERNMENT FILED THE TWO-COUNT INFORMATION.

ON THE DAY OF THE ARRAIGNMENTS, THERE WAS ANOTHER DEMONSTRATION OCCURRING IN WASHINGTON.

AT THAT POINT, THIS -- THIS WAS A SEPARATE DEMONSTRATION, A DIFFERENT GROUP.

THERE WERE A NUMBER OF PEOPLE INVOLVED IN THAT--

THE COURT: I DON'T THINK THAT HAS ANYTHING TO DO WITH THIS CASE.

I DON'T THINK IT DOES. WHAT IS THE RELEVANCE OF THAT TO THIS CASE?

MR. ELLENBOGEN: THE RELEVANCE IS -- THE RELEVANCE, I BELIEVE, YOUR HONOR, IS THAT THOSE DEFENDANTS, A NUMBER OF WHOM WERE ARRESTED AT THE WHITE HOUSE, WERE ENGAGING IN EXACTLY THE SAME CONDUCT AND THEY DECIDED THEY WOULD ENTER A GUILTY PLEA AT WHICH TIME THE GOVERNMENT FILED A ONE-COUNT INFORMATION. I HAVE A COPY OF THAT THAT I CAN TENDER TO THE COURT.

I SUBMIT IN THIS CASE THAT THE TWO COUNTS BEING CHARGED IN THIS INFORMATION WAS SOLELY FOR THE PURPOSE OF COERCING OR PRESSURING THE DEFENDANTS TO ENTER GUILTY

PLEAS OR TO PAY THE $50 FINE WITH THE THREAT OF PROSECUTION AND A YEAR OF PRISON BEHIND THAT SHOULD THEY CHOOSE TO EXERCISE THEIR RIGHT TO TRIAL; THE RIGHT TO CONFRONT EVIDENCE AND TESTIMONY AGAINST THEM; THE RIGHT TO PRESENT WITNESSES ON THEIR OWN BEHALF AND THE FULL PLANOPLY OF RIGHTS THAT ATTACHES TO ONE'S RIGHT TO TRIAL.

NOW, THE GOVERNMENT IN ITS RESPONSE TO MY REQUEST POINTED OUT THAT THERE WAS A PLEA OFFER THAT HAS REMAINED OPEN TO ALL DEFENDANTS.

I AM PREPARED TO PUT ON WITNESSES AND SUBMIT TESTIMONY THAT THAT IS NOT AN ACCURATE -- A CORRECT REPRESENTATION AND THE WITNESSES THAT WERE PRESENT AT BOTH THE FIRST AND THE SECOND ARRAIGNMENTS WILL STATE THAT THERE WAS NO MENTION OF ANY PLEA OFFER AND WOULD ALSO REPRESENT THAT THERE ARE WITNESSES WHO WILL TESTIFY THAT THE OPPORTUNITY TO PAY THE $50 COLLATERAL AS THE U.S. ATTORNEY HAS INDICATED AND REPRESENTED HAS NEVER BEEN MADE KNOWN TO THE DEFENDANTS NOR HAS IT BEEN MADE KNOWN TO COUNSEL.

I AM AWARE THAT A NUMBER OF PEOPLE MAY HAVE GONE AHEAD AND SENT IN THE $50 HOPING THE COURT WOULD ACCEPT IT AND THERE WAS ALWAYS THE RISK THAT THE COURT WOULD NOT AND IN FACT, SOME OF THE DEFENDANTS HAD THEIR $50 COLLATERAL RETURNED.

IN ADDITION, IN CONFERENCES WITH THE U.S. ATTORNEY, THERE IS TESTIMONY AND EVIDENCE TO BE SUBMITTED -- PRESENTED

TO THE FACT THAT A NUMBER OF THE DEFENDANTS WERE THREATENED WITH JAILTIME SHOULD THEY NOT ENTER INTO A STIPULATION WITH THE GOVERNMENT.

THE ONLY CONCLUSION I CAN COME TO IS THAT THERE IS REASON TO BELIEVE THAT THERE IS AN IMPROPER MOTIVATION BEHIND THIS PROSECUTION AND THE GOVERNMENT'S GOING AHEAD AND PRESENTING THAT PROSECUTION.

THE COURTS HAVE HELD IN A NUMBER OF SITUATIONS THAT THE HARM TO BE AVOIDED IN A VINDICTIVE PROSECUTION ARGUMENT IS SIMPLY THE APPREHENSION OF THE EXERCISE OF ONE'S RIGHTS AT THIS STAGE WILL RESULT IN SIGNIFICANT PENALTIES AND A NUMBER OF PEOPLE WERE EXTREMELY SHOCKED AND APPREHENSIVE OF THE FACT THAT THEY ARE NOW BEING TOLD EITHER STIPULATE TO THE FACTS IN THIS CASE OR WE ARE GOING TO ASK THAT YOU ARE GOING TO BE -- OR THAT YOU ARE GOING TO BE PUT IN JAIL FOR TEN DAYS AS WELL AS THE FACT EXERCISING THEIR RIGHT TO TRIAL AND ENTERING A NOT GUILTY PLEA IS RESULTING IN THE GOVERNMENT FILING CHARGES THAT COULD AMOUNT TO A YEAR IN JAIL OR A THOUSAND DOLLAR FINE.

GRANTED THE GOVERNMENT HAS NOW WITHDRAWN ONE OF THOSE COUNTS, THE BASIS OF THAT COUNT WAS NOT SO MUCH TO ALLEVIATE ANY VINDICTIVENESS BUT MERELY TO FURTHER DEPRIVE INDIVIDUALS OF THEIR RIGHT TO A JURY TRIAL.

IN ADDITION, YOUR HONOR, AT THE PROPER TIME, A PROPER FOCUS OF INQUIRY INTO VINDICTIVE PROSECUTION IS

THE GOVERNMENT'S CONDUCT AT THE OUTSET.

IT IS IRRELEVANT THAT THE CHARGE ISTRIED ULTIMATELY AND I HAVE AUTHORITY FOR THAT IF YOUR HONOR WISHES IT, SO I WOULD SUBMIT IN THIS CASE THAT THE GOVERNMENT'S OVERALL CONDUCT AND OVERALL POSTURE IN NOT PROVIDING INFORMATION, THREATENING THE DEFENDANTS WITH JAIL IF THEY DO NOT ENTER INTO STIPULATIONS, AS WELL AS INITIALLY BRINGING ENHANCED PENALTIES FOR WHICH PEOPLE WERE NEVER ARRESTED, ALL AMOUNTS TO AN IMPROPER MOTIVATION AND THAT THERE IS A VINDICTIVE ELEMENT TO THAT, AND THAT ON THOSE BASES, THE COURT HAS HELD -- COURTS HAVE HELD AND CONTINUE TO SO HOLD IN THE ABSENCE OF A SHOWING THAT THERE IS A PROPER PROSECUTORIAL MOTIVATION TO THE PROSECUTOR'S CONDUCT, THAT THE COURT MUST FIND THAT THERE IS VINDICTIVENESS AND DISMISS THE INFORMATION.

THE COURT: I WILL LET YOU RESPOND TO THE GOVERNMENT'S ARGUMENT.

MR. ELLENBOGEN: THANK YOU VERY MUCH.

THE COURT: MR. MC DANIEL?

MR. MC DANIEL: MAY IT PLEASE THE COURT, YOUR HONOR, THE UNITED STATES IS OF THE VIEW WITH RESPECT TO THIS ISSUE THAT THIS CASE IS --

THE COURT: HAVE A SEAT, MR. ELLENBOGEN.

MR. MC DANIEL: -- IS MOST CLOSELY COMPARED TO THE UNITED STATES V. GOODWIN IN WHICH A PROSECUTOR, ONCE

A DEFENDANT REJECTED A PLEA OFFER OF MISDEMEANORS AND PETTY OFFENSES, SOUGHT TO INDICT ON FELONY CHARGES THE SAME DEFENDANT FOR OFFENSES ARISING IN THE SAME COURSE OF CONDUCT. IT IS IN FACT THE TIMING THAT IS THE CRUCIAL DETERMINATION, I SUBMIT, FOR THE COURT TO MAKE AND THAT BECAUSE THIS INFORMATION WAS FILED DURING THE MONTH OF MAY, WITHIN APPROXIMATELY 30 DAYS OF THE EVENTS GIVING RISE TO THE OFFENSE, THAT IT WAS OF THE NATURE THAT IS DESCRIBED IN GOODWIN WHICH, OF COURSE, APPEARS AT 457 UNITED STATES, AND BEGINNING AT 368, ON PAGE 381 THE COURT STATED VERY CLEARLY THAT IN THE COURSE OF PREPARING A CASE FOR TRIAL, THE PROSECUTOR MAY UNCOVER ADDITIONAL INFORMATION THAT SUGGESTS A BASIS FOR FURTHER PROSECUTION OR SIMPLY COME TO REALIZE THAT THE INFORMATION PRESENTED BY THE STATE HAS A BROADER SIGNIFICANCE.

I WOULD SUBMIT TO THE COURT THAT IN LIGHT OF THE --

THE COURT: YES, BUT YOU DON'T HAVE THAT SITUATION HERE. THERE IS NO ADDITONAL INFORMATION THAT WASN'T AVAILABLE TO THE PROSECUTION AT THE VERY OUTSET WHEN THE ARRESTS WERE MADE.

MR. MC DANIEL: YOUR HONOR, I WOULD SUGGEST BECAUSE OF THE VAST NUMBER OF ARRESTS AND THE AMOUNT OF PAPER WORK THAT HAD TO BE PROCESSED --

THE COURT: IF WHAT YOU SAY IS TRUE, THEN THERE

WOULD BE DIFFERENT CHARGES AGAINST DIFFERENT INDIVIDUALS ARISING OUT OF THE ADDITIONAL INFORMATION.

MR. MC DANIEL: PERHAPS, YOUR HONOR.

THE COURT: YOU KNEW EVERYTHING EXCEPT THE DETAILS OF WHAT THE OFFICER WOULD TESTIFY TO AND THE CONFIRMATION OF THE ALLEGED MISCONDUCT WAS KNOWN AT THE TIME THAT THEY WERE GIVEN THE TICKET.

MR. MC DANIEL: THE FACTS WERE KNOWN, YOUR HONOR.

THE COURT: CERTAINLY THEY WERE KNOWN.

MR. MC DANIEL: THE RECOGNITION OF WHICH LEGAL THEORY THE GOVERNMENT WISHED TO PROCEED ON WAS A DIFFERENT MATTER. THAT IS SOMETHING THAT REQUIRED A CERTAIN AMOUNT OF CONTEMPLATION AND ANALYSIS BY MEMBERS OF THE UNITED STATES ATTORNEY'S OFFICE AND THAT WAS MOTIVATED, I WOULD SUGGEST, SOLELY BY A BALANCING OF THE SOCIETAL INTERESTS IN CONTROLLING UNRULY DEMONSTRATIONS AND THE RELATIVE GRAVITY OF THIS PARTICULAR OFFENSE GIVEN ITS EFFECT UPON THE COMMUNITY.

I WOULD LIKE TO ADD THAT THE OFFER FOR INDIVIDUALS TO FORFEIT THE $50 COLLATERAL REMAINS OPEN TO TODAY UP TO THE BEGINNING OF TRIAL AND HAS REMAINED OPEN THROUGHOUT.

I WOULD FURTHER SUGGEST TO THE COURT THAT AT NO TIME DURING PLEA NEGOTIATIONS DID THE UNITED STATES THREATEN OR INTIMATE THAT INDIVIDUALS WOULD BE INCARCERATED IN ANY FORM WHATSOEVER.

FURTHER, YOUR HONOR --

HE COURT: WELL, THE GOVERNMENT CAN'T DETERMINE WHO IS GOING TO BE INCARCERATED OR NOT. THE COURT HAS TO DETERMINE THAT AND THEN ONLY AFTER TRIAL. THE GOVERNMENT HASN'T ANYTHING TO DO WITH THAT.

MR. MC DANIEL: I RECOGNIZE THAT.

THE COURT: THE GOVERNMENT HAS NOTHING TO DO WITH THE FINE OR THE INCARCERATION.

MR. MC DANIEL: I RECOGNIZE THAT, YOUR HONOR.

IN ADDITION, WITH RESPECT TO THE STIPULATION, MR. ELLENBOGEN AND I DID IN FACT REACH AN AGREEMENT RESPECTING THE STIPULATION THAT WOULD PRESERVE APPELLATE RIGHTS AND SAVE THE COURT THE EXPENSE AND THE TROUBLESOMENESS OF AN EXTENDED TRIAL THAT INVOLVED A LARGE NUMBER OF DEFENDANTS. THAT AGREEMENT HAS FALLEN THROUGH SINCE THE TIME THAT IT WAS EFFECTED BY MR. ELLENBOGEN AND MYSELF.

I WOULD SUGGEST TO THE COURT THAT THE SITUATION WE HAVE HERE WITH RESPECT TO PROSECUTORIAL VINDICTIVENESS IS ONE THAT RESEMBLES THE PLEA BARGAIN STAGES, THE EARLY STAGES IN A CRIMINAL PROSECUTION. THE PROSECUTORIAL LATITUDES ARE VERY, VERY BROAD AND WHEN IT IS APPROPRIATE UP TO THE DAY OF TRIAL FOR THE PROSECUTOR TO CHANGE A THEORY OF PROSECUTION WITHOUT FEAR OF A CHALLENGE ON THE BASIS OF PROSECUTORIAL VINDICTIVENESS.

I WOULD SUGGEST THAT THERE IS NO PRESUMPTION

UNDER GOODWIN OR UNDER BORDENKIRCHER THAT OPERATES HERE AND THAT IN FACT AN ACTUAL DEMONSTRATION OF GENUINE VINDICTIVENESS OR ACTUAL MALICE IS SOMETHING THAT HAS TO BE DEMONSTRATED BY THE DEFENDANTS AT THIS STAGE AND THAT IS A HEAVY BURDEN THAT HAS NOT BEEN MET AND THAT BASED UPON THE DEFENDANTS' PROFFER, IT COULD NOT BE MET IN THE EVENT OF TESTIMONY.

I SUBMIT TO THE COURT THAT THE BEHAVIOR OF THE UNITED STATES WITH RESPECT TO THESE CHARGES WAS AN ENTIRELY APPROPRIATE EXERCISE OF PROSECUTORIAL DISCRETION.

THE COURT: MR. ELLENBOGEN?

MR. ELLENBOGEN: I WOULD LIKE TO BRIEFLY RESPOND TO SOME OF THE GOVERNMENT'S REPRESENTATIONS.

FIRST OF ALL, WE SUBMIT THAT THERE WAS NO ADDITIONAL INFORMATION THAT BECAME KNOWN TO THE GOVERNMENT BETWEEN MAY 15TH AND MAY 29TH THAT THEY DID NOT HAVE AVAILABLE TO THEM ON MAY 15TH.

THEREFORE, THERE IS REALLY NO BASIS FOR BRINGING IN ADDITIONAL CHARGES, HAVE THE GOVERNMENT ADEQUATELY INFORM PEOPLE OF THEIR OBLIGATION TO APPEAR AND ENTER THEIR PLEAS AND ASSERT THEIR RIGHTS TO TRIAL.

I ALSO RECOMMEND THAT THIS IS NOT A SITUATION LIKE BORDENKIRCHER IN WHICH YOU ARE DEALING WITH A FULLY INFORMED DEFENDANT WHO KNOWS OF THEIR RIGHTS AND THE OPTIONS AVAILABLE TO THEM, WHICH IS THE SITUATION THAT BORDENKIRCHER ADDITIONALLY -- WHICH IN FACT THIS COURT HAS ADDRESSED

IN THE -- THE COURT'S INDULGENCE FOR A MOMENT.

IN THE CASE OF THE UNITED STATES V. VELSICOL CHEMICAL CORPORATION AT 498 F. SUPP. 1255, 1980, IN AN OPINION DRAFTED AND PREPARED BY HIS HONOR JUDGE PARKER, THAT COURT DISTINGUISHED THE BORDENKIRCHER SITUATION FROM THE BLACKRIDGE AND PERRY SITUATION WHERE YOU HAVE VINDICTIVE MOTIVATION FOR THE ASSERTION OF RIGHTS AND INDICATED THAT THE DISTINGUISHING FACTOR FOR THIS COURT IS WHETHER OR NOT YOU ARE WITHIN THE GIVE AND TAKE OF PLEA NEGOTIATION.

I AM PREPARED TO HAVE WITNESSES COME FORWARD AND TESTIFY THAT THE FIRST OPPORTUNITY THAT A PLEA NEGOTIATION WAS EVER MADE AVAILABLE WAS AT THE END OF JUNE, SOME 60 DAYS AFTER THE PEOPLE WERE ARRESTED WHERE THEY FIRST FOUND OUT ABOUT THE ADDITIONAL CHARGE AND THERE WAS NO GIVE AND TAKE PLEA NEGOTIATION AT ALL WITHIN THAT INITIAL 60 DAYS AND THERE WAS NO GIVE AND TAKE.

THE PLEA BARGAIN SITUATION IS A SITUATION WHERE YOU HAVE A FULLY INFORMED DEFENDANT WHO IS ADVISED OF THE VARIOUS CONSEQUENCES AVAILABLE TO THEM. THEY ARE ADVISED OF THE VARIOUS COURSES OF ACTION OPEN TO THE GOVERNMENT AND THAT THEY ARE IN A POSITION TO EITHER ASSERT THEIR RIGHTS KNOWING WHAT THOSE CONSEQUENCES WOULD BE, AND THIS IS NOT A SITUATION WHERE THERE HAS BEEN A GIVE AND TAKE OF A PLEA NEGOTIATION PROCESS.

IN FACT, THE CONVERSATION BETWEEN THE COUNSEL,

THE PRO SE DEFENDANTS AND THE UNITED STATES ATTORNEY COULD HARDLY BE CHARACTERIZED AS A PLEA NEGOTIATION PROCESS WITH A GIVE AND TAKE AVAILABLE.

IN THE ABSENCE OF THAT SITUATION, WE COULD NOT APPLY EITHER THE GOODWIN OR THE BORDENKIRCHER ANALYSIS WHICH FOCUSES ON A FULLY INFORMED DEFENDANT.

THERE IS NO FULLY INFORMED DEFENDANT. THERE ARE DEFENDANTS WHO ARE PREPARED TO TESTIFY THAT THEY HAVE NEVER BEEN INFORMED THAT THE OPPORTUNITY TO POST $50 COLLATERAL INITIALLY WAS AN OPTION THAT IS STILL AVAILABLE.

THERE WERE REPRESENTATIONS TO THE CONTRARY AND THE GOVERNMENT'S RESPONSES DO NOT ADEQUATELY REPRESENT WHAT THE DEFENDANTS KNEW AT THE TIME THAT THEY WERE ARRAIGNED AND WHAT THEIR OPTIONS WERE.

IF YOUR HONOR WISHES TO HEAR TESTIMONY AND TO TAKE EVIDENCE TO THAT ISSUE, I AM PREPARED TO PROCEED BUT THERE IS NO PROSECUTORIAL MERIT TO BRING THE ADDITIONAL CHARGE.

THERE IS NO INFORMATION THAT CAME TO LIGHT THROUGHOUT THE PLEA NEGOTIATION PROCESS THAT THE GOVERNMENT DID NOT HAVE AVAILABLE AT THAT POINT.

THAT INFORMATION, AND I ASKED FOR A BILL OF PARTICULARS WHICH THIS COURT DENIED, AND THEREFORE THERE WAS NO REASON FOR THAT INFORMATION TO BE GIVEN TO ME AND THERE WERE NO ADDITIONAL CHARGES BROUGHT BASED ON THAT.

THE ADDITIONAL COUNT WAS LODGED SOLELY AFTER PEOPLE ELECTED THEIR RIGHT TO RETURN TO THIS COURT TO EXERCISE THEIR RIGHTS TO A FAIR TRIAL, TO A FULL TRIAL, AND IN LIGHT OF THAT, THEY FOUND THEMSELVES FACING SIGNIFICANTLY MORE SERIOUS CHARGES THAT THEY HAD NOT BEEN ARRESTED ON INITIALLY WHICH CHARGES WERE LODGED WELL AFTER THE 30 DAYS FROM THE BASIS OF THE INITIAL ARREST.

THANK YOU, YOUR HONOR.

THE COURT: MR. MC DANIEL?

MR. MC DANIEL: VERY BRIEFLY, YOUR HONOR.

YOUR HONOR, I WOULD SUGGEST TO THE COURT THAT THE DEFENDANTS' POSITION FITS VERY NEATLY INTO THE BORDENKIRCHER V. HAYES CASE WHERE THE COURT STATED THAT THE PROSECUTOR'S COURSE OF CONDUCT WHICH OPENLY PRESENTED TO THE DEFENDANTS THE ALTERNATIVES BETWEEN DISPOSING OF THE CASE AND FOREGOING TRIAL OR FACING MORE SERIOUS CHARGES WERE NOT VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT.

HERE, EVEN UP TO TODAY, IT IS THE GOVERNMENT'S POSITION THAT THE DEFENDANTS MAY EITHER FOREGO TRIAL AND FORFEIT THE $50 COLLATERAL OR FACE CHARGES UPON WHICH THEY ARE PLAINLY SUBJECT TO PROSECUTION.

BASED UPON THAT, THE GOVERNMENT SUGGESTS THAT ITS CONDUCT IN THIS CASE WAS ENTIRELY APPROPRIATE.

THE COURT: THE QUESTION IS NOT WHETHER THEY

CAN FORFEIT.

LET ME BACK UP. THEY WERE ARRESTED AND CHARGED WITH A VIOLATION WHICH AT THAT TIME PERMITTED THEM TO FORFEIT OR GO TO TRIAL ON THAT VIOLATION. ISN'T THAT CORRECT?

MR. MC DANIEL: THAT IS CORRECT, YOUR HONOR.

THE COURT: THE PROBLEM ARISES WHEN THOSE WHO CHOSE NOT TO FORFEIT AND SAID THAT THEY WANTED TO GO TO TRIAL, WERE NOT GOING TO BE BROUGHT TO TRIAL ON THE VIOLATION ON THE BASIS OF THE FORFEITURE. THEY WERE GOING TO BE BROUGHT TO TRIAL ON TWO SEPARATE OFFENSES, NOT ONE, BUT TWO, AND THEY FACED AT THAT POINT NOT A SIMPLE PENALTY FOR A RELATIVELY MINOR DISMEANOR BUT THEY FACED THE PROSPECT OF INCARCERATION UP TO A YEAR AND A $1,000 FINE.

IN THE SEQUENCE OF EVENTS, IT IS OBVIOUS THAT THE ONLY REASON THAT THE TWO COUNTS CAME OUT AS THEY DID WAS THAT THEY HAD ELECTED TO GO TO TRIAL, NOT TO GO TO TRIAL FOR WHICH THEY WERE ARRESTED BUT TO GO TO TRIAL ON SOMETHING ELSE.

I THINK THAT GIVES THE GOVERNMENT A PROBLEM.

IF IT IS NOT VINDICTIVE, WHAT ELSE IS IT WHEN THE CIRCUMSTANCES THAT GAVE RISE TO THE ORIGINAL ARREST HAVE NOT CHANGED ONE IOTA DESPITE ALL THE GOVERNMENT'S EVIDENCE.

IT DOES NOT FIT INTO THE PATTERN OF THOSE CASES THAT YOU CITE IN WHICH AT THE INITIAL ARREST, WHICH HAPPENS

VERY FREQUENTLY, AS A ROUTINE MATTER OF COURSE THE POLICE OFFICER ARRESTS FOR "X" BECAUSE THIS IS WHAT HE SEES AND THEN IN THE COURSE OF THE INVESTIGATION THEY DISCOVER "Y" AND "Z", TAKE IT TO A GRAND JURY AND GET AN INDICTMENT AND CHARGE HIM ON ALL OF THEM.

THAT IS NOT WHAT WE HAVE HERE.

WE HAVE A SITUATION HERE WHERE THEY ARE ORIGINALLY ARRESTED WITHOUT ANY ADDITIONAL CHANGE IN THE FACTUAL CIRCUMSTANCES AND THEN IT SUDDENLY BECOMES SOMETHING ENTIRELY DIFFERENT WHEN THEY EXERCISE THEIR RIGHT TO TRIAL.

THEY HAD A RIGHT TO TRIAL ON THE ORIGINAL ARREST. THAT IS WHAT THEY HAD A RIGHT TO TRIAL ON IF THEY WANTED IT OR TO FORFEIT THE $50 AND GO ABOUT THEIR BUSINESS.

THEY SAID, NO, WE WANT TO CARRY ON THIS PROTEST THROUGH THE LEGAL PROCESS WHICH THEY ARE ENTITLED TO DO.

SOME WANTED TO BE PRO SE AND SOME HIRED A LAWYER AND WHEN THEY DID THAT, WHAT DO THEY FIND OUT? THE WHOLE BALLGAME IS CHANGED AND AGAIN, NOT BECAUSE THERE WAS A SINGLE DISTINGUISHING FACTOR BETWEEN WHAT HAPPENED UP THERE AT THE WHITE HOUSE ON THE DAY IN QUESTION, NOT AN ADDITIONAL THING. THEY ARE NOT CHARGED WITH ADDITIONAL ASSAULTS OR ANYTHING ELSE. THAT IS THE PROBLEM.

AT BOTTOM, YOU SEE, WHAT MAKES THIS CASE DIFFERENT FROM SOME OF THESE OTHERS, MOST OF THOSE THAT YOU CITE, IT ARISES OUT OF, UNQUESTIONABLY, THE EXERCISE OF THEIR

FIRST AMENDMENT RIGHTS.

NOW, THAT DOES NOT GIVE THEM CARTE BLANCHE TO DO ANYTHING THEY WANT TO DO. THERE IS NO QUESTION ABOUT THAT AND THEY KNOW THAT AND THEY KNOW I KNOW IT. IT DOES NOT GIVE THEM CARTE BLANCHE BUT IT DOES NOT DEPRIVE THEM OF THEIR RIGHTS EITHER.

MR. MC DANIEL: MAY I BE HEARD, YOUR HONOR?

THE COURT: OH, WE HAVE PLENTY OF TIME. I WILL HEAR YOU AD NAUSEAM, I GUESS.

MR. MC DANIEL: YOUR HONOR, IN THE GOODWIN CASE, THE DEFENDANT WAS ARRESTED FOR A SERIES OF MISDEMEANORS AND TRAFFIC OFFENSES ON THE BALTIMORE-WASHINGTON PARKWAY.

HE WAS THEN PRESENTED TO THE UNITED STATES MAGISTRATE IN HYATTSVILLE WHERE HE FACED TRIAL ON A SERIES OF MISDEMEANOR CHARGES, AND THE MAXIMUM EXPOSURE WHICH WAS SOME SIX MONTHS.

HE DECLINED TO ENTER INTO A PLEA. HE DECLINED TO PLEAD OUT TO THOSE MISDEMEANORS JUST AS THE DEFENDANTS IN THIS CASE DECLINED TO PAY THE $50.

AS A RESULT THE CASE WAS REASSIGNED TO A DIFFERENT PROSECUTOR AND A FELONY INDICTMENT WAS RENDERED UPON WHICH THE DEFENDANT WAS ULTIMATELY --

THE COURT: WHAT WAS THE FELONY INDICTMENT?

MR. MC DANIEL: THE FELONY INDICTMENT WAS BASED UPON PRECISELY THE SAME FACTS AND PRECISELY THE SAME

OFFENSES THAT OCCURRED ON THE BALTIMORE-WASHINGTON PARKWAY ON THE NIGHT THAT GAVE RISE TO THE ORIGINAL MISDEMEANOR WARRANT, BUT INSTEAD OF A MISDEMEANOR CHARGE OF SIMPLY ASSAULT AND A MISDEMEANOR CHARGE OF FLEEING ARREST, THE CHARGES WERE INSTEAD, ASSAULTING A FEDERAL OFFICER, A FELONY AND OTHER FELONY CHARGES.

THEY WERE THE SAME FACTS, THE SAME CHARGES BUT THEY WERE SIMPLY CHARGED AS MORE GRAVE OFFENSES.

IN GOODWIN, AS THE COURT KNOWS, IT WAS THE TIMING THAT WAS CRITICAL. IT WAS NOT AN EFFORT BY THE UNITED STATES TO PENALIZE THE INDIVIDUAL BECAUSE HE HAD EXERCISED A PROCEDURAL RIGHT SUCH AS AN APPEAL. IT WAS SIMPLY A PRETRIAL PLEA BARGAINING SORT OF EXCHANGE BETWEEN THE PARTIES WHERE THE DEFENDANT WAS GIVEN THE OPTION OF GOING AHEAD AND DISPOSING OF THE CASES ON MINOR MISDEMEANOR GROUNDS OR OF DEMANDING HIS RIGHTS AND IT WAS HIS RIGHT TO TRIAL BEFORE A UNITED STATES DISTRICT JUDGE, FACING MORE SERIOUS POTENTIAL PENALTIES.

BECAUSE OF THE PRETRIAL NATURE OF THAT PARTICULAR CASE, THE COURT FOUND THAT THERE WAS NO PRESUMPTION OF VINDICTIVENESS THAT COULD LIE GIVEN THOSE FACTS; THAT WAS, ACCORDING TO THE COURT'S REASONING, LARGELY BASED ON THE IMPORTANCE OF THE PLEA BARGAIN TOOL IN THE ADMINISTRATION OF JUSTICE.

I WOULD SUBMIT TO THE COURT THAT THERE UNDER

THESE FACTS, WE HAVE A MINOR PETTY OFFENSE THAT CAN BE DISPOSED OF BY ANY DEFENDANT, EVEN UP TO TODAY, BY SIMPLY FORFEITING A $50 COLLATERAL, AND THOSE WHO ELECT TO EXERCISE THE RIGHT TO TRIAL, WHICH THEY UNQUESTIONABLY HAVE, THEN ARE FACING UP TO SIX MONTHS IN PRISON AND THAT IS ANALOGOUS, ALTHOUGH LESS SERIOUS, LESS SEVERE, THAN THE SITUATION IN GOODWIN BUT VERY, VERY EASILY COMPARED.

THE MINOR OFFENSE, THE $50 FORFEITURE OF COLLATERAL REPRESENTS MR. GOODWIN'S MISDEMEANOR CONVICTION POSSIBILITIES AND THIS MORE SERIOUS PETTY OFFENSE THAT IS BEFORE THE COURT TODAY IS EASILY ANALOGIZED TO THE FELONY INDICTMENT THAT WAS ULTIMATELY RETURNED AGAINST MR. GOODWIN AND UPON WHICH HE WAS ULTIMATELY FOUND GUILTY.

IT WAS BECAUSE OF THE PRETRIAL BEHAVIOR OF THE GOVERNMENT AND THE NECESSITY FOR WIDE PROSECUTORIAL LATITUDE THAT THE COURT ENDORSED THE BEHAVIOR OF THE UNITED STATES IN THE GOODWIN CASE AND IT WAS NOT SO MUCH AN EXERCISE OF FIRST AMENDMENT RIGHTS BUT AN EXERCISE OF PROCEDURAL RIGHTS AND I SUGGEST TO THE COURT THAT ALTHOUGH THE DEFENDANTS BEFORE THE COURT DO HAVE A RIGHT TO EXERCISE HERE IN THE COURT, THAT THEY DO NOT HAVE FIRST AMENDMENT RIGHTS THAT ENTITLE THEM TO BREAK PARTICULAR STATUTES OR TO VIOLATE FEDERAL REGULATIONS.

THE COURT: NO, I DID NOT SUGGEST THAT.

I WAS SUGGESTING THAT WE START FROM A DIFFERENT

PREMISE.

WE STARTED FROM A PREMISE WHERE THERE IS GREAT SENSITIVITY AS FAR AS THE COURTS ARE CONCERNED. WE DON'T TALK ABOUT SOMEBODY DRIVING DOWN THE HIGHWAY AND DOING RIDICULOUS THINGS. THERE IS NO CONSTITUTIONAL RIGHT TO DRIVE.

MR. MC DANIEL: YES, YOUR HONOR.

THE COURT: YOUR GOODWIN DEFENDANT WAS NOT EXERCISING ANY BASIC CONSTITUTIONAL RIGHT.

MR. MC DANIEL: THAT IS TRUE, YOUR HONOR. THE CONSTITUTIONAL ELEMENT OF THIS CASE, BECAUSE OF THE RELATIVE INSEVERITY OF THE OFFENSE, I BELIEVE THE COURT SHOULD OVERLOOK FOR THE PURPOSE OF THIS PARTICULAR MOTION.

THE COURT: NO, THAT SUGGESTS THAT THE MORE HELL YOU RAISE, THE MORE VALUABLE YOUR CONSTITUTIONAL RIGHT IS.

MR. MC DANIEL: YOUR HONOR, THE INITIAL OFFENSE AROSE OUT OF THE CLAIMED EXERCISE OF CONSTITUTIONAL RIGHT AND THE RELATIONSHIP BETWEEN THE $50 FORFEITURE AND THIS PARTICULAR PETTY OFFENSE MISDEMEANOR TO THE CONSTITUTIONAL RIGHT ARE IN FACT THE SAME, BUT PROCEDURALLY WITH RESPECT TO THE GOVERNMENT'S DECISION, I SUGGEST TO THE COURT THAT IT FITS VERY, VERY TIGHTLY INTO GOODWIN AND THAT BASED UPON GOODWIN AND THE COURT'S ENCOURAGEMENT THERE FOR THE VALUE OF THE PLEA BARGAINING, THAT THE GOVERNMENT'S BEHAVIOR WAS ENTIRELY APPROPRIATE.

THE COURT: SO YOU SAY THAT THERE CAN BE A PLEA BARGAINING BUT THE OTHER SIDE DOESN'T KNOW THAT THE PLEA EXISTS?

MR. MC DANIEL: NO, YOUR HONOR, THAT IS NOT WHAT I AM SAYING.

FROM THE EARLIEST MEETINGS THAT THE UNITED STATES ENGAGED IN WITH MR. ELLENBOGEN, THERE HAS ALWAYS BEEN A PLEA AGREEMENT. THE PLEA AGREEMENT REMAINS OPEN TODAY. THE BARGAIN IS AVAILABLE.

THE DEFENDANTS WHO WISH NOT TO FORFEIT COLLATERAL ARE ENTIRELY FREE TO GO AHEAD WITH THE CASE BUT THOSE WHO EVEN TODAY DESIRE TO FORFEIT COLLATERAL AND TO HAVE THE OUTSTANDING INFORMATION DISMISSED AGAINST THEM, ARE ENTIRELY WELCOME TO THAT OPTION.

WE HAVE ALWAYS BEEN AVAILABLE FOR NEGOTIATION. IT IS SOMETHING THAT IS ENCOURAGED ROUTINELY IN THE UNITED STATES ATTORNEY'S OFFICE.

WE REMAIN OPEN TO THAT OR ANY OTHER REASONABLE ALTERNATIVES THAT THE DEFENSE MIGHT BE WILLING TO PROPOSE.

THE COURT: MR. ELLENBOGEN WISHES TO BE HEARD AGAIN.

MR. ELLENBOGEN: THANK YOU, YOUR HONOR.

IN RESPONSE TO THE GOVERNMENT'S ARGUMENT IN TERMS OF BORDENKIRCHER -- EXCUSE ME. NOT BORDENKIRCHER BUT GOODWIN, I WOULD LIKE TO POINT OUT THAT IN THE COURSE OF THE GOODWIN

FACTUAL SETTING, GOODWIN HAD FAILED TO APPEAR AT ONE POINT AND SO THERE WAS A FACTUAL CHANGE DURING THE COURSE OF THAT INVESTIGATION, IN THE COURSE OF THAT PLEA NEGOTIATION, THAT DID GIVE THE GOVERNMENT IN THAT CASE THE LEGITIMATE RIGHT TO GO AHEAD AND REEVALUATE ITS CASE.

THERE HAS BEEN NO SUCH FACTUAL CHANGE IN THIS CASE.

I WOULD ALSO REPRESENT THAT THE FIRST TIME A PLEA NEGOTIATION WAS MADE AVAILABLE TO MYSELF AND TO THE DEFENDANTS WAS AT THE JUNE 21ST ARRAIGNMENT WHICH WAS SOME TWO MONTHS AFTER THE PEOPLE HAD BEEN ARRESTED AND AFTER A SECOND SERIES OF CHARGES HAD BEEN BROUGHT, AFTER THE GOVERNMENT HAD SIGNIFICANTLY UPPED THE ANTE, AND WHICH MR. MC DANIEL WELL ACKNOWLEDGED, ONCE AN OPTION WAS MADE AVAILABLE TO PEOPLE, THERE WERE DEFENDANTS WHO DID TAKE ADVANTAGE OF THAT OPTION.

THIS IS THE FIRST THAT I OR ANY DEFENDANTS HAVE EVER HEARD THAT WE STILL HAD THE OPTION OR SOME HAD THE OPTION OR THAT ANYONE COULD HAVE PAID THE $50 INITIAL COLLATERAL.

THE COURT: I DON'T THINK AT THIS STAGE IT MAKES ANY DIFFERENCE FOR YOUR CLIENTS OR FOR THE PRO SE DEFENDANTS BECAUSE THEY DON'T INTEND EITHER WAY.

MR. ELLENBOGEN: THE PROPER FOCUS IS NOT THAT THE GOVERNMENT'S REPRESENTATIONS ON THE 12TH HOUR, ON THE

VERGE OF TRIAL, AND THE PROPER FOCUS OF THE INQUIRY IS THEIR DECISION TO INITIATE THE CHARGES IN THE FIRST PLACE AND I WOULD SUBMIT FOCUSING THE COURT'S ATTENTION ON THAT, THE GOVERNMENT HAS NOT ESTABLISHED THAT THIS IS NOT A VINDICTIVE PROSECUTION.

THE COURT: THE GOVERNMENT DOES NOT HAVE THE BURDEN.

MR. ELLENBOGEN: YOUR HONOR, I WOULD RESPECTFULLY DISAGREE AND SAY THAT ONCE THE DEFENDANT HAS ESTABLISHED A REASON TO BELIEVE THAT THERE WAS AN IMPROPER MOTIVATION, THE BURDEN SHIFTS TO THE GOVERNMENT TO ESTABLISH THAT THERE IS NO VINDICTIVENESS AND I REFER THE COURT TO THE UNITED STATES V. VELSICOL.

THE COURT: YES, BUT YOU ARE ASSUMING A PREMISE THAT YOU HAVE ESTABLISHED. THE GOVERNMENT HAS TO RESPOND TO IT.

MR. ELLENBOGEN: I UNDERSTAND THAT THE GOVERNMENT HAS TO RESPOND BUT I DON'T THINK THAT THEIR RESPONSE HAS ADEQUATELY ESTABLISHED A PROPER PROSECUTORIAL MOTIVATION IN BRINGING THE SECOND CHARGES.

THE FOCUS OF OUR INQUIRY AT THIS POINT IS NOT WHAT IS HAPPENING TODAY, NOT THE POSTURE OF THIS CASE AT THIS POINT, BUT THE POSTURE OF THE CASE AT THE TIME THE GOVERNMENT FILED THE CHARGES AND UPPED THE ANTE FOR PEOPLE WHO HAD EXERCISED THEIR RIGHT TO TRIAL.

I SUBMIT ON THAT BASIS AND ON THE BASIS OF THE RECORD IN THIS CASE, THAT THERE IS A VINDICTIVE MOTIVATION FOR THIS PROSECUTION AND THAT REFERENCE TO GOODWIN MADE BY THE GOVERNMENT HAS TO BE SUSPECT BECAUSE ON THE BASIS OF THE FACTS IN GOODWIN, THERE WERE FACTS THAT CHANGED IN THE COURSE OF GOODWIN GIVING A LEGITIMATE BASIS FOR THE GOVERNMENT IN GOODWIN TO REEVALUATE ITS CASE.

HERE, THERE HAS BEEN NO CHANGE AND THERE IS NO PROPER PROSECUTORIAL MOTIVATION.

THE GOVERNMENT IS NOT ALLEGING DIFFERENT CHARGES. THIS SITUATION IS MORE ANALOGOUS TO THE CASE OF THE UNITED STATES V. SCHILLER WHERE THE COURT SAID THAT IT WASN'T VINDICTIVE BECAUSE BY REINDICTING PEOPLE AND ADDING CHARGES THE GOVERNMENT WAS THEREFORE IN A POSITION TO BRING CHARGES IT LEGALLY COULD NOT OTHERWISE BRING UNDER THE INITIAL INDICTMENT. AND THAT WAS A LEGITIMATE PROSECUTORIAL MOTIVE.

BUT HERE THERE ARE NO ADDITIONAL CHARGES THAT THE GOVERNMENT IS BRINGING THAT IT COULD NOT HAVE BROUGHT INITIALLY.

THERE IS NOTHING GIVING RISE TO IT. THERE HAS BEEN NO FURTHER INVESTIGATION GIVING RISE TO ADDITIONAL FACTS GIVING RISE TO ADDITIONAL CRIMES.

I WILL SAY THAT THERE HAS BEEN NO LEGITIMATE EXPLANATION FOR THE CONDUCT IN BRINGING THE TWO CHARGES THAT HAS EVER BEEN PROFFERED TO ME AND I SUBMIT THAT NO

SUCH EXPLANATION HAS BEEN PROFFERED TO THE COURT AND THAT IT WAS SOLELY BY VIRTUE OF THE FACT THAT AFTER THE GOVERNMENT WAS INFORMED THAT THE PEOPLE WERE GOING TO EXERCISE THEIR RIGHT TO TRIAL TO CHALLENGE THE CHARGES, THAT THE GOVERNMENT DECIDED TO REEVALUATE ITS CASE AND TO BRING A SECOND COUNT TO FURTHER COERCE AND INTIMIDATE PEOPLE INTO ACCEPTING THE $50 OPTION.

A NUMBER OF PEOPLE DID THAT. A NUMBER OF $50 CITATIONS HAVE BEEN PAID AND A NUMBER OF PEOPLE HAVE HAD THEIR CASE TRANSFERRED BECAUSE OF THE THREAT, THE PROSECUTION OF A POSSIBLE YEAR IN JAIL.

BUT TO CHARACTERIZE THIS AS A PLEA NEGOTIATION PROCESS IS BEING A BIT DISINGENUOUS. THERE HAS BEEN NO REAL GIVE AND TAKE FROM APRIL 22ND -- FROM MAY 15TH WHEN WE INITIALLY GOT TOGETHER AND THE END OF JUNE WHEN THE GOVERNMENT FOR THE FIRST TIME MADE A PLEA OFFER AVAILABLE.

ONCE THAT OFFER WAS MADE AVAILABLE, THERE WERE A NUMBER OF PEOPLE THAT DID TAKE THAT OFFER UP.

IT WAS NOT UNTIL THE GOVERNMENT RESPONDED TO MY MOTION THAT IT WAS BROUGHT TO MY ATTENTION THAT THE GOVERNMENT WAS STILL GOING TO ALLOW PEOPLE TO PAY THE $50 COLLATERAL.

I SUBMIT THAT THERE IS NO PROPER MOTIVATION FOR BRINGING THIS PROSECUTION AT THIS STAGE OF THE GAME AND THE REMAINING COUNT IN THE INFORMATION SHOULD BE DISMISSED.

THANK YOU, YOUR HONOR.

THE COURT: DO YOU WISH TO BE HEARD AGAIN?

MR. MC DANIEL: NO, I WILL SUBMIT.

MS. WASHINGTON: MAY I APPROACH THE BENCH, YOUR HONOR?

THE COURT: IDENTIFY YOURSELF.

MS. WASHINGTON: MY NAME IS MINDY WASHINGTON, A PRO SE DEFENDANT.

I WOULD LIKE TO SAY THAT THE PRO SE DEFENDANTS WOULD LIKE TO ADDRESS THIS ARGUMENT AND THERE ARE DEFENDANTS PREPARED TO GIVE TESTIMONY ON IT AND I WANT TO MAKE IT CLEAR THE PRO SE DEFENDANTS ARE INTERESTED IN IT.

THE COURT: ALL RIGHT.

HAVE YOU TALKED WITH THEM AS A GROUP, THE PRO SE DEFENDANTS.

MS. WASHINGTON: YES.

THE COURT: WHY DON'T YOU MAKE A REPRESENTATION AS TO WHAT YOUR CONTENTION AND THEIRS IS AND THEN WE WILL SEE WHETHER WE HAVE TO PUT THEM UNDER OATH.

I WILL ACCEPT YOUR REPRESENTATION AS TO WHAT YOUR POSITION IS AND WE CAN EXPLORE IT PRELIMINARILY TO SEE WHAT YOUR CONTENTION IS.

MS. WASHINGTON: OK. COULD I HAVE THE COURT'S INDULGENCE?

THE COURT: SURELY.

IT MIGHT BE MORE HELPFUL TO YOU SO YOU HAVE THE OPPORTUNITY TO DISCUSS THIS AS A GROUP IF I TAKE A FEW MINUTES RECESS.

WOULD THAT HELPFUL TO YOU SO YOU CAN THINK THROUGH WHAT IT IS YOU WANT TO SAY IN A FASHION THAT I CAN UNDERSTAND AND THE GOVERNMENT CAN UNDERSTAND.

MS. WASHINGTON: YES.

THE COURT: DO YOU THINK TEN MINUTES WOULD BE SUFFICIENT?

MS. WASHINGTON: YES.

THE COURT: DO THAT AND THEN I WILL COME BACK.

(WHEREUPON, A SHORT RECESS WAS TAKEN.)

AFTER RECESS

THE COURT: YES, MA'AM.

MS. WASHINGTON: THE PRO SE DEFENDANTS HAVE DISCUSSED THIS DURING THE RECESS AND WE THINK IT IS IMPORTANT FOR THE COURT TO HEAR PEOPLE SPEAK ON THIS ARGUMENT, TO HEAR TESTIMONY BEFORE RULING ON THE VINDICTIVE PROSECUTION.

THE PRO SE DEFENDANTS AGREE WITH MR. ELLENBOGEN AND THEY WISH TO SUPPLEMENT THAT WITH THEIR TESTIMONY.

THE COURT: WHAT KIND OF TESTIMONY, TESTIMONY ABOUT WHAT, ON WHAT ISSUE?

MS. WASHINGTON: ON THE ISSUES OF THE THREAT OF INCARCERATION, ON DUE PROCESS AND THEY ARE WILLING AND WOULD LIKE TO PROFFER EVIDENCE ON THAT, AND I BELIEVE ANOTHER

PRO SE DEFENDANT WOULD LIKE TO ADDRESS THE BENCH AS WELL FOR THAT.

THE COURT: ALL RIGHT.

MS. HEARN: I AM JUDITH HEARN, ONE OF THE --

THE COURT: I AM SORRY. YOU WILL HAVE TO SPEAK UP.

MS. HEARN: I AM JUDITH HEARN, ONE OF THE PRO SE DEFENDANTS.

THE COURT: YES, MS. HEARN.

MS HEARN: I -- PARTLY THIS IS TO REITERATE WHAT YOU SAID FIRST.

THE PROSECUTION SEEMS TO CLAIM THAT -- OR I BELIEVE IT IS THE CLAIM THAT IN THE ANALOGOUS CASE, THE GOODWIN CASE, THAT GOODWIN HAD REFUSED TO ENTER A PLEA AND THAT IT WAS ON THAT BASIS THAT THE CASE WAS THEN REASSIGNED AND THEN ON THE REASSIGNMENT, THEY ADDED CHARGES.

I WANTED TO POINT OUT THAT WE WERE ESSENTIALLY NOT GIVEN A CHANCE TO ENTER A PLEA BECAUSE WE WERE NOT ACQUITTED -- NOT ACQUITTED, BUT AT ARRAIGNMENT WE WERE NOT GIVEN A CHANCE, AND AT THAT POINT WE WERE IN JAIL WE WERE NOT GIVEN A CHANCE TO -- THE OTHER PEOPLE WHO WERE ARRESTED AND WE WERE ONLY GIVEN A CHANCE AT ARRAIGNMENT IN JUNE WHEN THEY BROUGHT THE ADDITIONAL CHARGES AND THE SECOND THING, I BELIEVE YOU SAID THIS, YOUR HONOR, ALREADY, BUT I WANT TO REITERATE IT FROM THE POINT OF VIEW OF THE DEFENDANTS.

IT SEEMS TO ME THAT THE PROSECUTION IS SAYING THAT IF WE -- ON THE ONE HAND, IF WE HAD POSTED COLLATERAL WHICH IS MORE OR LESS EQUIVALENT TO A GUILTY PLEA --

THE COURT: NO, IT IS FORFEITURE THAT IS GUILTY BUT NOT JUST POSTING IT.

YOU CAN POST COLLATERAL AND THEN COME TO TRIAL.

MS. HEARN: OK. I DON'T THINK THAT WAS EVER EXPLAINED TO US AND IT WAS MORE OR LESS EXPLAINED TO US THAT IT WAS LIKE A PARKING TICKET.

THE COURT: WHEN YOU GET A PARKING TICKET, YOU CAN PAY THE TICKET AND ASK TO HAVE IT CONTESTED AND YOU GO TO A HEARING AND THE HEARING OFFICER WILL DETERMINE WHETHER YOU ARE ENTITLED TO GET YOUR MONEY BACK. THAT IS THE SAME AS WITH COLLATERAL.

MS. HEARN: OK. BUT WITH MY UNDERSTANDING OF IT, IT SEEMS TO ME LIKE IT IS A RATHER CIRCULAR ARGUMENT BECAUSE WE COULD EITHER POST COLLATERAL OR MORE OR LESS -- I GUESS IT IS A QUESTION OF UNDERSTANDING. IT WAS NOT EXPLAINED TO ME WHAT THE OPTIONS WOULD BE. IT SEEMED TO BE A PLEA AND THAT SEEMED LIKE DOUBLE JEOPARDY.

IT SEEMED LIKE WE WOULD HAVE NO CONSTITUTIONAL RIGHTS. THANK YOU.

MS. HAND: MY NAME IS JUDITH HAND. I AM A PRO SE DEFENDANT.

I WOULD LIKE TO ADDRESS MR. MC DANIEL'S CLAIM

THAT A PLEA BARGAIN WAS AVAILABLE TO ALL DEFENDANTS AT ALL TIMES.

I WAS IN THE FIRST GROUP OF PEOPLE TO BE ARRAIGNED ON THE 29TH OF MAY AND NO PLEA BARGAIN WAS OFFERED TO US AT THAT TIME.

I RETURNED WITH SOME OF THE OTHER PEOPLE THAT WERE ARRAIGNED ON THE SECOND ARRAIGNMENT DATE AND THEN BECAME AWARE THAT THEY HAD BEEN OFFERED -- THAT IF THEY PLED GUILTY OR NOLO, THEY WOULD RECEIVE PROBATION OR TIME SERVED DEPENDING UPON WHETHER THEY HAD SPENT TIME IN JAIL, AND THAT WAS NEVER OFFERED TO US IN THE FIRST GROUP OF PEOPLE TO BE ARRAIGNED.

ALSO, WE WERE NOT TOLD OF THE SECOND CHARGE. WE WERE NOT GIVEN THAT INFORMATION OR READ THAT INFORMATION UNTIL AFTER WE HAD ALREADY PLED TO BOTH CHARGES WHICH WE DIDN'T KNOW WAS BOTH CHARGES AT THAT TIME.

WE THOUGHT WE WERE JUST PLEADING TO DEMONSTRATING WITHOUT A PERMIT OR AT LEAST THAT WAS MY UNDERSTANDING.

ALSO MR. MC DANIEL'S CONTENTION THAT THE $50 FORFEITURE POSSIBILITY HAS BEEN AVAILABLE TO US THROUGHOUT THIS WHOLE PROCESS HAS NOT BEEN MADE CLEAR.

I WAS NOT AWARE OF THAT, NOT AWARE THAT I HAD THAT OPTION TO PAY $50 AND BE DONE WITH THIS WHOLE PROCESS.

IT WAS MY UNDERSTANDING AND I THINK THE UNDERSTANDING OF THE OTHERS, AND I OBVIOUSLY CAN'T SPEAK FOR

THEM, BUT THAT ONCE I ENTERED A NOT GUILTY PLEA, IF I CHOSE TO CHANGE THAT PLEA TO GUILTY OR NOLO, THAT MY SENTENCE WOULD BE AT THE DISCRETION OF THE COURT AND NOT THE FACT THAT I COULD PAY $50 AND THE WHOLE THING WOULD BE DONE AWAY WITH.

SO I THINK THAT HIS CONTENTION ABOUT THOSE ISSUES IS PATENTLY FALSE AND NOT ON ISSUES OF FACT.

THANK YOU.

MS. CHILDERS: MY NAME IS JO ELLEN CHILDERS. I AM ONE OF THE PRO SE DEFENDANTS AND IN FACT, I AM THE ONLY PRO SE DEFENDANT THAT LIVES IN THIS AREA, SO I HAVE MET WITH MR. MC DANIEL AND NO ONE ELSE IN THIS GROUP HAS.

THE PROFFER OF EVIDENCE, SHOULD I BE ABLE TO TESTIFY ON THE STAND, I WOULD BE THE PERSON WHO WOULD BE TESTIFYING TO THE FACT THAT MR. MC DANIEL DID INDEED THREATEN MYSELF AND THE OTHER PRO SE DEFENDANTS IN THE CASE IF WE WOULD NOT STIPULATE TO THE FACTS IN THE CASE AND I CAN ALSO --

THE COURT: THIS WAS AFTER THE TWO-COUNT INFORMATION WAS FILED? IS THAT CORRECT?

MS. CHILDERS: THIS IS WELL AFTER THAT.

THE COURT: WHAT CONTACT, IF ANY, DID YOU HAVE WITH THE PROSECUTOR PRIOR TO THE TIME OF THE TWO COUNTS?

MS. CHILDERS: PRIOR TO THE INFORMATION?

THE COURT: YES.

MS. CHILDERS: I WAS IN THE SECOND ARRAIGNMENT SO BY THE TIME I CAME INTO COURT --

THE COURT: YOU WERE ARRAIGNED ON WHAT?

MS. CHILDERS: I WAS ARRAIGNED ON THE TWO COUNTS AT THAT TIME.

THE COURT: YES, AND PRIOR TO THAT TIME, WHAT, IF ANY, CONVERSATIONS DO YOU ALLEGE YOU HAD WITH ANY MEMBER OF THE PROSECUTOR'S OFFICE?

MS. CHILDERS: I HAD NOT HAD ANY CONTACT WITH THE PROSECUTION WHATSOEVER PRIOR TO THAT TIME AND SO WHEN I AM TALKING ABOUT THE THREAT, I AM TALKING ABOUT SOMETHING THAT OCCURRED ON SEPTEMBER 3RD, WHICH WAS AT THE TIME WHEN I --

THE COURT: FOR OUR PURPOSES, THAT IS NOT THE CRUCIAL ISSUE.

MS. CHILDERS: OK.

THE COURT: IS THERE ANYTHING ELSE?

MS. CHILDERS: NO.

THE COURT: WHO AMONG THE DEFENDANTS, WHETHER YOU ARE REPRESENTED BY COUNSEL OR NOT, WHO AMONG THE DEFENDANTS HAVE HAD ANY CONVERSATION WITH ANY MEMBER OF THE PROSECUTION PRIOR TO THE TIME THAT YOU CAME TO ARRAIGNMENT ON THE INFORMATION CHARGING THE TWO COUNTS?

(NO RESPONSE.)

THE COURT: HAS ANY DEFENDANT HAD ANY INFORMATION OR ANY CONFERENCE WITH THE PROSECUTOR OR ANY REPRESENTATIONS

FROM THE PROSECUTOR DIRECTLY OR THROUGH COUNSEL?

MR. ELLENBOGEN?

MR. ELLENBOGEN: MAY IT PLEASE THE COURT --

THE COURT: PRIOR TO THE ARRAIGNMENT ON THE TWO-COUNT INFORMATION, I WANT TO KNOW IF ANY DEFENDANT HAS HAD ANY CONTACT WITH THE PROSECUTOR. THAT IS WHAT I WANT TO KNOW.

MR. ELLENBOGEN: PRIOR TO THE ARRAIGNMENT, YOUR HONOR, THE ONLY CONTACT THAT ANY DEFENDANT MAY HAVE HAD WAS A SMALL PERCENTAGE OF THE TOTAL NUMBER OF ARRESTEES WHO RECEIVED A NOTICE ON OR ABOUT THE 15TH OF MAY TO APPEAR IN COURT FOR A CHARGE OF DEMONSTRATING WITHOUT A PERMIT.

THE COURT: ALL RIGHT.

MR. MC DANIEL, WHAT IS THE GOVERNMENT'S REPRESENTATION WITH RESPECT TO WHAT WENT ON BETWEEN THE GOVERNMENT AND ANY DEFENDANT PRIOR TO THE TIME THAT ANY DEFENDANT APPEARED FOR ARRAIGNMENT ON THE TWO-COUNT INFORMATION?

MR. MC DANIEL: YOUR HONOR, NO ONE FROM THE STAFF OF THE UNITED STATES ATTORNEY SPOKE TO ANY INDIVIDUAL DEFENDANT PRIOR TO THE ARRAIGNMENT AND THE REASONS BEING, OF COURSE, DISCIPLINARY RULE 7104, THE POSSIBILITY THAT THEY MIGHT RETAIN COUNSEL.

HOWEVER, I CAN REPRESENT TO THE COURT THAT PRIOR TO THE SECOND TWO ARRAIGNMENTS IN THESE CASES --

THE COURT: OF ADDITIONAL DEFENDANTS?

MR. MC DANIEL: YES,YOUR HONOR, THAT I DID IN FACT ENGAGE IN DISCUSSIONS, AND IN SOMETHING RESEMBLING NEGOTIATIONS WITH MR. ELLENBOGEN BUT THERE IS ONLY ONE SINGLE DEFENDANT WITH WHOM I HAVE EVER SPOKEN PERSONALLY AND THAT IS MS. CHILDERS WHO RECENTLY ADDRESSED THE COURT AND THAT WAS FAR AFTER THE INFORMATION WAS FILED.

MR. ELLENBOGEN: YOUR HONOR, JUST TO CLARIFY THE RECORD FOR YOUR HONOR'S INFORMATION, THE FIRST CONTACT I HAD WITH THE GOVERNMENT REGARDING THIS CASE WAS WHEN I WAS INFORMED BY THE MAGISTRATE'S CLERK THAT PEOPLE WERE TO APPEAR ON MAY 15TH FOR ARRAIGNMENT AND AT THAT POINT I DID MEET WITH THE PROSECUTION, WITH MR. MC DANIEL, AND THERE WAS NO REFERENCE, NO MENTION WHATSOEVER, THAT AN ADDITIONAL COUNT WAS GOING TO BE BROUGHT AND YET I HAVE REPRESENTED TO MR. MC DANIEL AND TO VARIOUS MEMBERS OF THE PARK POLICE AND THE CLERK'S OFFICE AND THE MAGISTRATE'S OFFICE THAT PEOPLE ARE WILLING TO RETURN TO EXERCISE THEIR RIGHTS TO A TRIAL.

IT WAS AFTER THAT -- IT WAS TWO WEEKS AFTER THAT THAT THE FIRST INFORMATIONS WERE EVER DRAFTED OR FILED AND THAT WAS THE FIRST TIME THAT THE TWO COUNTS WERE EVER MADE KNOWN TO ANYONE.

THE COURT: IS THIS FACTUALLY ACCURATE? DO YOU WANT ME TO PUT PEOPLE ON THE STAND AND TAKE TESTIMONY UNDER OATH OR ARE THESE REPRESENTATIONS MADE ACCURATE?

MR. MC DANIEL: I AM SATISFIED WITH THE REPRESENTATIONS, YOUR HONOR.

MR. ELLENBOGEN: YOUR HONOR, WITH RESPECT TO THE NOTES THAT THE PEOPLE WERE SENT, I HAVE HERE A COPY OF THE LETTER THAT WAS SENT OUT FROM THE CLERK'S OFFICE PURSUANT TO OUR MEETING ON MAY 15TH, AND I WOULD LIKE TO RECITE FROM THE FIRST SENTENCE OF IT.

"THAT YOU ARE CITED BY THE PARK POLICE ON APRIL 22ND FOR THE ALLEGED VIOLATION OF 36 CFR 50.19, DEMONSTRATING WITHOUT A PERMIT."

THROUGHOUT THE LETTER THERE IS NO REFERENCE WHATSOEVER TO THE SECOND CHARGE.

THE COURT: THAT IS REALLY NOT THE ISSUE.

MR. ELLENBOGEN: THE ISSUE AS TO THE INFORMATION THAT PEOPLE HAD AT THE TIME THAT THEY WERE ARRESTED AND THE BRINGING OF THE CHARGES, AND I THINK THIS IS JUST A POINT OF INFORMATION.

THE COURT: IT IS MY VIEW THAT GOODWIN DOES NOT CONTROL THIS CASE ON THE FACTS THAT WE KNOW.

GOODWIN, AS LAWYERS KNOW WHO HAVE READ THE CASE, WAS A SITUATION IN WHICH THE MISDEMEANOR CHARGES WERE BROUGHT THERE WAS DISCUSSION AND THE PROSECUTOR SAID, LOOK, COP TO THESE PLEAS OR SOMETHING BIG AND BAD CAN HAPPEN TO YOU.

IN ESSENCE THAT IS WHAT HE WAS TOLD. THE DEFENDANT SAYS, NO.

THE PROSECUTOR SAID, FINE. HE GOT A GRAND JURY INDICTMENT, FELONIES ARISING OUT OF THE SAME BASIC INFORMATION, AND THE COURT OF APPEALS DIDN'T LIKE IT AND THE SUPREM COURT SAID, NO, THAT IS QUITE ALL RIGHT, BECAUSE IT WAS IN THE CONTEXT OF A GIVE AND TAKE BETWEEN THE PROSECUTOR AND THE DEFENDANT AND THE DEFENDANT HAD MADE HIS ELECTION KNOWING THAT HE FACED STIFFER CHARGES DOWN THE WAY, WHICH WAS HIS RIGHT TO DO NO MATTER WHAT THE PROSECUTOR THOUGHT ABOUT IT OR THE INCONVENIENCE THAT IT WAS GOING TO PUT TO THE GOVERNMENT.

THESE CASES ALL HAVE TO DEPEND UPON THE FACTS AND IT IS UNCONTRADICTED ON THIS RECORD THAT HAVING BEEN ARRESTED, EVERY ONE OF THESE DEFENDANTS KNEW EXACTLY WHAT HE WAS ARRESTED FOR.

THEY SHOW UP FOR AN ARRAIGNMENT AND HAVE TO RESPON TO AN INFORMATION INVOLVING TWO COUNTS.

THERE WAS NO NOTICE, FORMAL, INFORMAL, TO THE INDIVIDUAL PRO SE DEFENDANTS OR THROUGH COUNSEL THAT THE POSSIBILITY EXISTED THAT IF THEY DIDN'T POST THE COLLATERAL OR FORFEIT THE COLLATERAL, THEY WERE GOING TO BE SUBJECTED TO ADDITIONAL CHARGES WHETHER OR NOT THEY AROSE OUT OF THAT INCIDENT OR ANYTHING ELSE THAT THE GOVERNMENT CHOSE LEGITIMATELY TO BRING AGAINST THEM WHICH IS AN ENTIRELY DIFFERENT SITUATION.

THE INITIAL CHARGE, A PETTY MISDEMEANOR, THE

MINIMUM POSSIBILITY OF A FINE OR INCARCERATION SUDDENLY BLOSSOMS INTO THE POSS BILITY OF A $1,000 FINE AND A YEAR IN JAIL ABSOLUTELY OUT OF THE BLUE, SO TO SPEAK, WITH NO ADDITIONAL REASONS THAT COULD HAVE POSSIBLY BEEN CONJURED UP OR IN FACT WERE OFFERED BY THE GOVERNMENT, ALTHOUGH THE GOVERNMENT IS NOT OBLIGATED, NECESSARILY, TO TELL YOU ITS REASONS, BUT THERE HAS TO BE SOME BASIS FOR IT WHICH CHANGES THE SITUATION.

GOODWIN CLEARLY INDICATES TO THIS COURT THAT WHATEVER THE BASIS FOR THE CHANGE IN THE GOVERNMENT'S POSITION, SOME KNOWLEDGE AND INFORMATION HAS TO BE GIVEN TO AN INDIVIDUAL DEFENDANT SO THAT SHE OR HE CAN MAKE THE DETERMINATION OR ELECTION WHETHER THEY WANT TO FACE THE ADDITIONAL CHARGES.

NO SUCH OPPORTUNITY WAS EVER AFFORDED ANY ONE OF THE DEFENDANTS PRESENTLY CHARGED THROUGH COUNSEL, THROUGH NOTICE, OR ANYTHING ELSE. YOU ELECT NOT TO FORFEIT AND YOU TELL THE GOVERNMENT WE WANT TO GO TO TRIAL AND THE GOVERNMENT SAYS, FINE. WE ARE GOING TO ARRAIGN YOU BUT ON WHAT?

ON A TWO-COUNT INFORMATION AND THE FACT THAT THE GOVERNMENT CONTENDS, AND I DON'T DISPUTE THE GOVERNMENT'S CONTENTION BECAUSE THE OFFER HAS BEEN MADE IN OPEN COURT AND THE FACT THAT THE GOVERNMENT IS STILL WILLING FOR YOU TO FORFEIT THE $50 AND GO ABOUT YOUR BUSINESS DOESN'T CHANGE THE PICTURE ONE IOTA AS FAR AS THE LEGAL STATUS IN WHICH

THE GOVERNMENT FINDS ITSELF AND WHICH YOU FIND YOURSELVES.

TO THIS COURT, WHAT THE COURT OF APPEALS WILL THINK ABOUT IT, I DON'T KNOW, BUT TO THIS COURT IT'S A CLEAR INDICATION THAT IN THE EXERCISE OF YOUR RIGHT TO HAVE A JURY TRIAL, THE GOVERNMENT UPPED THE ANTE, AS FAR AS THE GOVERNMENT IS CONCERNED, WITH NO NOTICE, NO CONSULTATION, WITH NO OPPORTUNITY FOR YOU TO MAKE AN ELECTION.

I THINK THAT IS A VIOLATION OF YOUR DUE PROCESS RIGHTS AND I DISMISS THE INFORMATION AS TO ALL DEFENDANTS.

MR. ELLENBOGEN: THANK YOU, YOUR HONOR.

(WHEREUPON, THE HEARING WAS CONCLUDED.)

CERTIFICATE OF REPORTER

THIS RECORD IS CERTIFIED BY THE UNDERSIGNED TO BE THE OFFICIAL TRANSCRIPT OF THE ABOVE-ENTITLED HEARING.

OFFICIAL COURT REPORTER

CRIMINAL INCIDENT RECORD

PARK RANGER
JUVENILE

2 ORGANIZATION CODE: 3260 | 3 SYSTEM AREA: 1600 Pennsylvania Ave. NW, DC | 4 LOCATION CODE: 1001 | 5 YEAR: 85 | CASE/INCIDENT NUMBER: 015

6 LOCATION OF INCIDENT: West Executive Gate | BEAT: 821 | DAY: 22 | YR: 85 | 24 HOUR TIME: 12:00 | HRS | MIN | DAY OF WEEK: 04

7 OFFENSE/INCIDENT CODE | 12 NATURE OF INCIDENT: Demonstrating Without A Permit 36CFR50.19 | 13 WHEN RECEIVED DATE: 4-22-85 TIME: 1200

COMPLAINANT / WITNESS / VICTIM

14 LAST | FIRST | MI | C V W | 15 DATE OF BIRTH | 16 PHONE BUSINESS

17 ADDRESS NUMBER | STREET | CITY | STATE | ZIP | 18 PHONE RESIDENCE

19 LAST | FIRST | MI | C V W | 20 DATE OF BIRTH | 21 PHONE BUSINESS

22 ADDRESS NUMBER | STREET | CITY | STATE | ZIP | 23 PHONE RESIDENCE

ARRESTED / SUSPECT / OTHER

24 LAST: Tarver, Lisa (NMN) | FIRST | MIDDLE | A S O | AA | 25 DATE OF BIRTH: 3-22-60 | 26 PHONE BUSINESS: unknown

27 ADDRESS NUMBER | STREET: 1302 Delafield Place NW, DC | CITY | STATE | ZIP | 28 PHONE RESIDENCE: unknown

29 RACE	30 SEX	31 AGE	32 HGT	33 WGT	34 EYES	35 HAIR	36 HAIR LENGTH	37 HAIR STYLE	38 FACIAL HAIR	39 MARKS/SCARS	40 ARMED WITH
white	F	25	5 2	120	brn	brn	long	---	no	no vis.	no

41 HAT	42 COAT/JACKET	43 SHIRT	44 TROUSERS/SKIRT	45 SHOES	46 SOCIAL SECURITY NUMBER	47 POID
	flower print/	white pants/sandels			217 48 0957	

48 LAST | FIRST | MIDDLE | A S O | 49 DATE OF BIRTH | 50 PHONE BUSINESS

51 ADDRESS NUMBER | STREET | CITY | STATE | ZIP | 52 PHONE RESIDENCE

53 RACE	54 SEX	55 AGE	56 HGT	57 WGT	58 EYES	59 HAIR	60 HAIR LENGTH	61 HAIR STYLE	62 FACIAL HAIR	63 MARKS/SCARS	64 ARMED WITH

65 HAT	66 COAT/JACKET	67 SHIRT	68 TROUSERS/SKIRT	69 SHOES	70 SOCIAL SECURITY NUMBER	71 POID

72 VEHICLE ☐ INVOLVED IN CRIME ☐ KNOWN TO OPERATE | 73 YEAR | 74 MAKE | 75 MODEL | 76 BODY STYLE | 77 COLOR | 78 TAG NUMBER | 79 STATE | 80 IDENTIFYING FEATURES/VIN

81 ☐ IMPOUNDED ☐ STOLEN ☐ RECOVERED ☐ SEIZED | REMOVED TO | REMOVED BY | 82 NCIC ☐ TELETYPE ☐ RADIO LOOKOUT ☐ | 83 VALUE RECOVERED $

83 ARREST(S) DATE: 4-22-85 | 84 TIME: 1200 | 85 CHARGE(S): DEMONSTRATE W/O PERMIT | 86 COURT DATE: PENDING | 87 VALUE STOLEN $

9 ITEM	NARRATIVE (1) CONTINUATION OF ABOVE ITEMS. INDICATE ITEM NUMBER AT LEFT. INCLUDE ADDITIONAL WITNESSES AND SUSPECTS. (2) INDICATE HOW NOTIFIED OF INCIDENT. DESCRIBE DETAILS OF INCIDENT. (3) DESCRIBE PROPERTY AND ITS VALUE	90 STL	91 REC	92 PROP	93 VALU

On 4-22-85, above defendant along with other members of a group called "April Actions for Jobs, Justice and Peace" were demonstrating on the south sidewalk of 1600 Pennsylvania Ave.NW. The defendant and other members of the group sat in the driveway and obstructed and denied access to the West Executive Gate.

I heard U.S. Park Police Lt. M. Barrett, under the direction of Mr. R. Robbins-Solicitor/National Park Service, advise the defendant and the group that their permit was revoked and they would have to move or would be arrested. The defendant and the group were given this warning three times with a five minute period between each warning. After the third warning and waiting period, the defendant was arrested for "Demonstrating Without a Permit". The defendant was taken to the Anacostia Operations Facility, processed and released.

94 INVESTIGATOR NOTIFIED

STATUS ☐ OPEN ☐ SUSPENDED | CLOSED BY ☐ ARREST ☐ EXCEPTION ☐ UNFOUNDED | 96 DISPOSITION

97 REPORTING OFFICER: J. Materese | BADGE/ID: 0498 | DATE: 4-24-85 | 98 ASSISTING OFFICER: C. Covington | BADGE/ID: 142 | 99 SUPERVISOR | BADGE/ID | DAT

51a

NATIONAL PARK SERVICE

CRIMINAL INCIDENT R[illegible] ORD

U.S. PAR
PARK RANGE
JUVENI

3 ORGANIZATION CODE	3 SYSTEM AREA	4 LOCATION CODE	5 YEAR	CASE/INCIDENT NU
3960		2001	85	0150

6 LOCATION OF INCIDENT: 1600 Pennsylvania Ave. NW, DC

West Executive Gate

7 BEAT	8 WHEN (DATE OF INCIDENT)	MO	DAY	YR	9 24 HOUR TIME	HRS.	MIN.	10
121		04	22	85		12	05	

11 OFFENSE/INCIDENT CODE: 12 NATURE OF INCIDENT: Demonstrating Without a Permit 36CFR 50.19

13 WHEN RECEIVED: DATE 4-22-85 TIME 1205

COMPLAINANT / WITNESS / VICTIM

14 LAST	FIRST	MI	C V W	15 DATE OF BIRTH	16 PHONE BUSIN

17 ADDRESS NUMBER	STREET	CITY	STATE	ZIP	18 PHONE RESID

19 LAST	FIRST	MI	C V W	20 DATE OF BIRTH	21 PHONE BUSIN

22 ADDRESS NUMBER	STREET	CITY	STATE	ZIP	23 PHONE RESID

ARRESTED

24 LAST	FIRST	MIDDLE	A S O	25 DATE OF BIRTH	26 PHONE BUSINE
Sinai,	Julie	lynn		11-5-60	unknown

27 ADDRESS NUMBER	STREET	CITY	STATE	ZIP	28 PHONE RESID
1302	Delafield	Pl.NW, Washington, DC			unknown

29 RACE	30 SEX	31 AGE	32 HGT	33 WGT	34 EYES	35 HAIR	36 HAIR LENGTH	37 HAIR STYLE	38 FACIAL HAIR	39 MARKS/SCARS	40 ARMED WITH
white	F	24	5 6	150	brn	blk	shoulde	curl	no	no vis.	no

41 HAT	42 COAT/JACKET	43 SHIRT	44 TROUSERS/SKIRT	45 SHOES	46 SOCIAL SECURITY NUMBER	47 POID
		pink	white pants/white shoe		559 41 9418	

SUSPECT / OTHER

48 LAST	FIRST	MIDDLE	A S O	49 DATE OF BIRTH	50 PHONE BUSINES

51 ADDRESS NUMBER	STREET	CITY	STATE	ZIP	52 PHONE RESIDE

53 RACE	54 SEX	55 AGE	56 HGT	57 WGT	58 EYES	59 HAIR	60 HAIR LENGTH	61 HAIR STYLE	62 FACIAL HAIR	63 MARKS/SCARS	64 ARMED WITH

65 HAT	66 COAT/JACKET	67 SHIRT	68 TROUSERS/SKIRT	69 SHOES	70 SOCIAL SECURITY NUMBER	71 POID

72 VEHICLE ☐ INVOLVED IN CRIME ☐ KNOWN TO OPERATE | 73 YEAR | 74 MAKE | 75 MODEL | 76 BODY STYLE | 77 COLOR | 78 TAG NUMBER | 79 STATE | 80 IDENTIFYING FEATURES/VIN

☐ IMPOUNDED ☐ STOLEN ☐ RECOVERED ☐ SEIZED — REMOVED TO — 81 MOVED BY — 82 NCIC ☐ TELETYPE ☐ RADIO LOOKOUT ☐

83 ARREST(S) DATE	84 TIME	85 CHARGE(S)	86 COURT DATE	87 VALUE STOLEN $	88 VALUE RECOVERED $
4-22-85	1205	DEMONSTRATE W/O PERMIT	PENDING		

ITEM	NARRATIVE (1) CONTINUATION OF ABOVE ITEMS. INDICATE ITEM NUMBER AT LEFT. INCLUDE ADDITIONAL WITNESSES AND SUSPECTS. (2) INDICATE HOW NOTIFIED OF INCIDENT. DESCRIBE DETAILS OF INCIDENT. (3) DESCRIBE PROPERTY AND ITS VALUE	90 STL	91 REC	92 PROP	93 VAL
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	I heard U.S. Park Police Lt. N. Barrett, under the direction of Mr. R. Robbins-Solicitor/National Park Service, advise the defendant and the group that their permit was revoked and they would have to move or would be arrested. The defendant and group were given this warning three times with a five minute period between each warning. After the third warning and waiting period, the defendant was arrested for "Demonstrating Without a Permit". The defendant was taken to the Anacostia Operations Facility, processed and released on citation.				

52a

CRIMINAL INCIDENT RECORD

Field	Entry
2 Organization Code	3 7 9 6 0
3 System Area	1600 Pennsylvania Ave. NW
4 Location Code	1 0 0 1
5 Year	8 5
Case/Incident Number	0 1 5 0
6 Location of Incident	West Executive Gate
7 Beat	021
Occurred Mo/Day/Yr	0 4 2 2 8 5
Hour/Time	12 2 0 7
11 Offense/Incident Code	
12 Nature of Incident	Demonstrating Without A Permit 36CFR50.19
13 When Received — Date	4-22-85
13 When Received — Time	1207

Complainant / Witness / Victim

14 Last / First / MI — 15 Date of Birth — 16 Phone Business
17 Address Number / Street / City / State / Zip — 18 Phone Residence
19 Last / First / MI — 20 Date of Birth — 21 Phone Business
22 Address Number / Street / City / State / Zip — 23 Phone Residence

Arrested Suspect

Field	Entry
24 Last, First, Middle	Spener, Richard David
25 Date of Birth	6-11-61
26 Phone Business	unknown
27 Address	2504 Cliffbourne Pl. NW, DC
28 Phone Residence	unknown
29 Race	white
30 Sex	male
31 Age	23
32 Hgt	5 9
33 Wgt	155
34 Eyes	blue
35 Hair	brown
36 Hair Length	medium
37 Hair Style	curly
38 Facial Hair	no
39 Marks/Scars	no vis.
40 Armed With	
41 Hat	
42 Coat/Jacket	
43 Shirt	checked/
44 Trousers/Skirt	tan pants/
45 Shoes	blue
46 Social Security Number	499 74 8639
47 PDID	

Other

48 Last / First / Middle — 49 Date of Birth — 50 Phone Business
51 Address Number / Street / City / State / Zip — 52 Phone Residence
53 Race — 54 Sex — 55 Age — 56 Hgt — 57 Wgt — 58 Eyes — 59 Hair — 60 Hair Length — 61 Hair Style — 62 Facial Hair — 63 Marks/Scars — 64 Armed With
65 Hat — 66 Coat/Jacket — 67 Shirt — 68 Trousers/Skirt — 69 Shoes — 70 Social Security Number — 71 PDID

72 Vehicle ☐ Involved in Crime ☐ Known to Operate — 73 Year — 74 Make — 75 Model — 76 Body Style — 77 Color — 78 Tag Number — 79 State — 80 Identifying Features

☐ Impounded ☐ Stolen ☐ Recovered ☐ Seized — Removed To — Removed By

83 Arrest(s) Date	84 Time	85 Charge(s)	86 Court Date	87 Value Stolen	Value Recovered
4-22-85	1207 hrs	Demonstrate without Permit	pending	$	$

NARRATIVE: (1) CONTINUATION OF ABOVE ITEMS, INDICATE ITEM NUMBER AT LEFT, INCLUDE ADDITIONAL WITNESSES AND SUSPECTS. (2) INDICATE HOW NOTIFIED OF INCIDENT, DESCRIBE DETAILS OF INCIDENT. (3) DESCRIBE PROPERTY AND ITS VALUE.

On 4-22-85, above def. and other members of a group called "April Actions for Jobs, Justice and Peace" were demonstrating on the south sidewalk of 1600 Pa. Ave. NW. The Def. and other group members sat in the driveway and obstructed and denied access to the West Executive gate.

I heard U.S.P.P. Lt. M. Barrett, under the direction of Mr. Robbins-Solicitor/National Park Service, advise the def. and the group that their permit was revoked and they would have to move or they would be arrested. The def. and group were given this warning three times with a five minute period between each warning. After the third warning and waiting period, the def. was arrested for "Demonstrating without a Permit". The def. was taken to the Anacostia Operations Facility, processed and released on citation.

Investigator Notified

Status ☐ Open ☐ Suspended ☐ Closed/Arrest ☐ Exception ☐ Unfounded — Disposition

97 Reporting Officer	Badge ID	Date	98 Assisting Officer	Badge ID	99 Supervisor	Badge ID
J. Materese	0 - 7 3	4-24-85	COVINGTON	463		

No. 87-730

In The

UNITED STATES SUPREME COURT

October Term 1987

UNITED STATES OF AMERICA, Petitioner

versus

CHRISTINE MEYER, et al., Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

OPPOSITION TO THE GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI

Daniel E. Ellenbogen
3144 Plyers Mill Road
Kensington, MD 20895
(301) 942-3138
Counsel for Respondents

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America

Pro se respondents are:

Carol Bellin, JoEllen Childers, Judith Hearn, Rita Toll, Mindy Washington, Terri Galvin, Christine Meyer, Theresa Fitzgibbon, Virginia Senders.

Other respondents are:

Norman C. Jimerson, Angela J. O'Keefe, Susan J. Blake, Kitty Fives, Julie L. Sinai, Richard Spener, Lisa Tarver, Maria R. Conners, Jeanne Marie Walsh, Robert G. Coleman, Margret E. DeColigny, Wallie H. Mason, Edward R. Rauber, Mary S. Dailey, Joan E. Whitney, Cheryl L. Hughes, Margret Artego, Renata Eustis, Martin G. Weiner, Dawn M. Cook, Carol J. Chappell, Richard Deyo, Ann Marie Eisenberg, and Kevin Raymond Reilly. Jacob Weinstein, Margret Van Clief, Judith Hand

QUESTIONS PRESENTED

1. Whether it is error for a District Court to presume vindictiveness in a prosecutor's filing of enhanced charges against only those defendants who exercise their right to trial, when after inquiry, the government offers no explanation or justification for filing the enhanced charges.

2. Whether it is an abuse of discretion for a District Court to dismiss an information once it finds the prosecution tainted by vindictiveness.

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STATEMENT OF THE CASE

On April 22, 1985, the Park Police arrested over 200 persons for Demonstrating Without A Permit. Each arrestee was issued a Park Police citation allowing the recipient to fully dispose of the charges by posting and forfeiting $50.00. While many of the defendants sent in the $50.00 assessment in full satisfaction of the charge, others ignored the citation. The respondents in the case before the Court are those defendants who elected to return and demand trial in the District Court. The District Court dismissed the information based on vindictive prosecution when the U. S. Attorney made no effort to explain why additional charges were filed against only those defendants who chose to go to trial.

Arraignments in this case were scheduled to occur on May 14, 1985, but were cancelled due to inadequate notice. Although the arraignments did not occur on May 14, 1985, counsel for defendants met with the U.S. Attorney and representatives of the District Court Clerk's Office and Magistrate Jean Dwyer and devised a floating arraignment schedule. A series of arraignment dates was scheduled throughout May and June of 1985. Each arrestee would be sent special notice of the date set for that defendant's case.

Counsel for Defendants and the U.S. Attorney reviewed and approved the notice to defendants prior to its being sent. The notice advised each of the date for their arraignment in the case and also informed the recipient that the matter could be disposed of by sending in the $50.00 assessment prior to that date. There was no other discussion between defendants and the U.S. Attorney regarding charges or paying the $50.00 other than this notice.

The first arraignments in this case occurred on May 29, 1985. At the arraignment, the government filed a two count information against each defendant who appeared. The charges for these defendants included the original charge of Demonstrating Without a Permit and a second count of Blocking and Obstructing the Sidewalks and Driveways in front of the White House.

Together the two charges exposed each defendant to a maximum penalty of one year in jail and a $1,000 fine, or both.

Arrestees continued to appear for arraignment throughout the summer. Those arrestees who appeared were arraigned on the same two count information. At the same time, the government was accepting $50.00 payments from any arrestee who chose to send it. Defendants who appeared for arraignment, however, were never informed they retained the option to forfeit the $50.00 and terminate the case. This option would later be made available to defendants who had been arraigned on the two charges, but only at a point at which it was illusory.

Prior to trial, defendants filed a written motion for both a jury trial and to dismiss the information because of vindictive prosecution. The defendants argued that the aggregate sentence entitled them to a jury trial even though individually each charge did not. The motion to dismiss was premised on the U.S. Attorney having filed two charges against only those defendants who elected trial in the District Court. On September 6, 1985, the District Court granted the jury trial request and scheduled further argument on the motion to dismiss.

A hearing on the motion took place on September 11, 1985. Immediately prior to the hearing the government moved to dismiss the charge of Blocking and Obstructing in response to the Court granting the defendants a jury trial. Over the defendants' objection, the Court granted the government's motion to dismiss the additional charge.

At the hearing on the motion, defendants argued the government acted vindictively when it filed an additional charge against only those defendants who demanded trial in the District Court. Defendants claimed filing the enhanced charge was in retaliation for their demanding trial rather than paying the $50.00 assessment. Defendants argued four points: 1) the government had no legitimate basis for filing the additional charge, 2) the government was not factually precluded from filing the additional charge earlier, 3) the arrests were not for criminal conduct, per se, but for conduct arising from

exercising First Amendment rights and 4) the government sought to avoid a potentially prolonged trial for relatively minor offenses. Considering the additional charge was only filed against those defendants who returned to demand trial and there was no legitimate explanation for filing additional charges, the filing of additional charges must be considered retaliation for exercising protected constitutional rights to trial.

In response, the government argued the court had no authority to presume vindictiveness in a pretrial setting. Citing United States v. Goodwin, 457 U.S. 368 (1982), and Bordenkircher v. Hayes, 434 U.S. 357 (1978), the government argued its conduct was a legitimate response to the defendants' rejection of a plea offer. The government claimed there could be any one of a number of possible explanations justifying its charging policy, and this possibility of an explanation precluded the Court from making any further inquiry and from finding vindictiveness. Furthermore, the government argued there could be no vindictiveness in this case given the earlier dismissal of the second charge.

The Court rejected the government's arguments. The Court acknowledged that the prosecution generally has wide latitude in making its charging decisions, and that such decisions are generally beyond review. However, the Court reasoned the defendants had raised sufficient questions warranting some inquiry which the government failed to answer. The Court distinguished this case from that of Goodwin, supra claiming the defendants here were engaged in otherwise protected First Amendment activities, whereas the defendant in Goodwin, supra had no protected interest in assaulting a federal police officer. The Court also distinguished this case from a Bordenkircher, supra situation since there were no plea negotiations prior to the government filing the additional charge. Finding the government made no attempt to justify its charging decision or otherwise explain its actions as anything other than retaliation for the defendant's exercise of their trial rights, the Court dismissed the information. In a written opinion dated November

12, 1985, the Court reaffirmed its prior ruling and denied the government's petition for reconsideration.

The government then appealed to the Circuit Court of Appeals raising the same claims previously rejected by the District Court. In a written opinion filed on February 13, 1987, the Court of Appeals affirmed the District Court in all respects.

The Court held that under Goodwin, supra a defendant could succeed on such a claim by establishing actual vindictiveness in one of two ways. A defendant must first establish a minimum showing of a reasonable likelihood of vindictiveness. Once established, the burden would then shift to the government to provide an explanation. If the government convinced the court its explanation was legitimate, no vindictiveness would arise unless the defendant could objectively establish actual vindictiveness by the government. If, on the other hand, the government had no legitimate explanation, the defendant's initial showing would suffice to establish the vindictiveness. In the latter situation, vindictiveness is presumed based on the government's failure to provide an explanation. Based on the unique facts of this case, the Court found actual vindictiveness because the government failed to present any legitimate explanation for filing the additional charge.

The Court reasoned the defendants in this case presented a sufficient showing of a reasonable likelihood of vindictiveness. The Court initially noted four similarities between this case and Goodwin, supra. First, the additional charges were only filed after the defendants demanded trial. Second, the defendants were never advised that enhanced charges might be filed after demanding trial. Third, the defendants were never informed by the prosecutor that enhanced charges would be filed after demanding trial. Lastly, the enhanced charges were in no way connected with any conduct of the defendants subsequent to demanding trial. Noting these similarities, the court refused to base its finding of vindictiveness on these considerations alone.

> These circumstances alone, of course, fail to support a realistic likelihood of prosecutorial vindictiveness; the Supreme Court's ruling in Goodwin held as much. We note them because they combine with other circumstances in the case to suggest a retaliatory motive.

Petition App. A p. 8a.

One factor considered was the filing of additional charges against only defendants who demanded trial. Additional charges were not brought against any other defendants, although all participated in the same demonstration and conducted themselves in the same manner. The disparate treatment of identically situated defendants is a factor not present in Goodwin, supra but present in this case. The panel saw in such disparate treatment a suspicion of discrimination among defendants based on their exercise of the right to trial.

A second consideration was the relative simplicity and straightforward nature of the facts and law of the case. The panel recognized that in most cases, as in Goodwin, supra a prosecutor's initial charging decision is based on an incomplete knowledge of the facts. In this case, the court found those considerations missing. As the panel recognized, "the suspicion must grow that the prosecutor increased the charges not because of any further factual investigation or legal analysis, but because the defendants chose to exercise their constitutional rights." (Petition App. A at 9a) This consideration merely added to the suspicion of a retaliatory motive; it did not compel a finding of a retaliatory motive.

A third consideration was the government's conduct levelled against defendants after filing the additional charge. At the hearing on the motion to dismiss, the government moved to dismiss the additional charge in order to avoid a jury trial. The panel rejected the possibility of a benign explanation for this given the overall context in which it occurred. The panel found in this a "disturbing willingness to toy with the defendants." (Petition App. A at 10a) In his opinion concurring with the order vacating the grant of en banc review, Judge Silberman considered this to be "unseemly prosecutorial maneuvering."

(Petition App.B p.35a) A parallel factor is totally absent in Goodwin, supra and to the panel amounted to only one factor in finding a retaliatory motive.

Lastly, the panel considered the government's motivation to act vindictively. The panel concluded, based on the unique facts of this case, the government had strong motivation to avoid the "courtroom morass" presented by a thirty-plus co-defendant trial involving numerous pro se defendants raising First Amendment and other constitutional defenses. The peculiar aspects presented by such a trial makes the desire to avoid trial even more compelling than the desire to avoid trial present in any other criminal case, Goodwin, supra included.

The panel based its finding of a realistic likelihood of vindictiveness on the combination of these factors viewed in "their entirety" and in view of the government's failure to offer an adequate explanation of its decision, the panel also noted that the unique facts of this case bind the decision to only this case. To the extent the decision binds prosecutors in other cases, it only does so to the extent those prosecutors have no legitimate explanation for changing the charges. Secondly, the panel noted that even if the decision did bind prosecutors, a prosecutor would still be free to offer a legitimate explanation for enhancing the charges. Thirdly, the panel reasoned that there might not even be an appearance of vindictiveness if the arrestees were advised that demanding trial could lead to enhanced charges. Finally, the panel considered the government's predictions of dire consequence for the administration of justice to be greatly exaggerated given the limited application of its decision.

The Court also held that the remedy of dismissal was not an abuse of discretion. The Court noted the decision was limited to the unique facts of this case and considered it necessary to prevent furture occurrences of such government conduct.

The government now presents for a second time the same arguments presented previously in the Court of Appeals. It is in opposition that defendants now respond.

REASONS FOR DENYING THE PETITION

This case presents an application of the vindictive prosecution doctrine in a pretrial setting when the government failed to present any contrary evidence. The narrow ruling of the Court of Appeals, given the unique facts of this case, is a proper application of the doctrine notwithstanding the government's protestations to the contrary and predictions of dire consequences for the administration of justice.

In United State v. Goodwin, 457 U.S. 368 (1982), the Court ruled that a presumption of vindictiveness would not arise in a pretrial setting based merely on the timing of the government's filing of enhanced charges against a defendant. At the same time,the Court also recognized that "a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do". Goodwin, at 384. The District Court and Court of Appeals both found the respondents presented an appropriate case for applying this rule from Goodwin supra, especially in light of the government's failure to present evidence to the contrary.

Chief Judge Aubrey Robinson of the District Court ruled,

> The initial charge, a petty misdemeanor, the minimum possibility of a fine or incarceration suddenly blossoms into the possibility of a $1,000 fine and a year in jail absolutely out of the blue, so to speak, with no additional reasons that could have possibly been conjured up or in fact were offered by the government, although the government is not obligated, necessarily, to tell you its reasons, but there has to be some basis for it which changes the situation.

(Transcript of Proceedings on September 11, 1985, before Chief Judge Aubrey Robinson at pages 48, 49, Government Petition Appendix C at page 53a.)

In affirming this ruling, the Circuit Court of Appeals held,

> The government declined to come forward with any evidence that would erase such a presumption and thus doomed itself to the critical finding.

(Slip opinion in U.S. v. Meyer, et al. at page 6, Government Petition at Appendix A at p.6a.)

The government now argues that the Court of Appeals was

wrong for three reasons. First, the Court improperly applied a presumption of vindictiveness contrary to the holding in Goodwin, supra Secondly, as a matter of fact, the filing of the enhanced charge occurred in the context of plea negotiations, and is therefore not vindictive. Third, the court imposed an improper remedy once it did find vindictiveness.

Each of the government's arguments must fail. First, the Court of Appeals and District Court did not presume vindictiveness. Each court found vindictiveness when the government failed to offer an independent justification for the enhancement. Secondly, there is no basis in the record to consider this a plea bargaining case. Throughout its history, every court reviewing the case found no plea bargaining occurred. To characterize this case as a plea bargaining situation is not only misleading, it is dishonest and warrants no further discussion. Third, the traditional remedy for vindictiveness is dismissal. The doctrine was developed as a prophylactic rule, designed to operate in those unique situations involving the highly unusual occurrence of vindictiveness against a defendant. It may not be the only remedy or the best remedy for every situation, but it is an available remedy to be applied at the trial court's discretion. The government further argues that affirming the decision will emasculate the magistrate citation system, bind prosecutors to all arrest decisions made by police and otherwise prevent the police in the District of Columbia from dealing effectively with mass arrest situations. There is no indication that since September 11, 1985, the magistrate citation has disintegrated or that the police have been unable to effectively handle mass arrest situations in the District of Columbia. The dire predictions the government suggests are merely chimeras of its own creation with no basis in fact or reality.

Vindictive prosecution involves penalizing a defendant for doing what the law plainly allows. It can occur in a sentencing stage through the imposition of a greater sentence on retrial. It can occur in the charging stage by the filing of enhanced

charges in response to a defendant's invoking various procedural rights. A Due Process violation derives not from the action taken against the defendant, but an improper motivation for that action. Discerning motivations is difficult, and to assist in the determination, the Court seeks to discern a possible legitimate explanation that would dispel the appearance of vindictiveness. In those situations where there is no explanation, the Court presumes, "by operation of law, the increases" are vindictive. Wasman v. United States, 468 U.S. 559, 569 (1983)

In North Carolina v. Pearce, 395 U.S. 711 (1969), the imposition of a greater sentence after retrial was prohibited unless supported by objective factors regarding the defendant's conduct. Greater sentences were not barred per se, only those not supported by independent factors. The Court ruled that the Due Process Clause prohibits the imposition of a greater sertence solely in retaliation for exercising appellate rights.

In Blackledge v. Perry, 417 U.S. 21 (1974), the Court held that filing a felony indictment against a defendant for exercising a statutory right to de novo appeal violated the Due Process Clause. The rule of Pearce was extended to prevent the exercise of vindictiveness by a prosecutor.

In Pearce and Perry, there was no evidence in the record that would dispel the appearance of vindictiveness. Where the evidence is in the record, or other factors operate to dispel the appearance, no violation will be found.

In Colten v. Kentucky, 407 U.S 104 (1972), the structure of Kentucky's two tiered system was not unconstitutional simply because it created a possibility of increased punishment on retrial. The Court, however, did recognize that sentencing under that system would involve the same problem if there was evidence of actual vindictiveness. On the facts of Colten, the Court saw no reason to extend the "prophylactic rule" of Pearce, Wasman, supra at 564.

In Chaffin v. Stynchombe, 412 U.S. 17 (1973), the possibility of vindictiveness was found minimal where a jury

imposed sentence, even if on retrial. The intervention of the jury dispelled the possibility of actual vindictiveness by the judge or prosecutor. The Court did recognize that using a jury system to impose sentence after the exercise of a right would be a violation if coupled with other evidence of actual vindictiveness. Id., at 32, n.20., See Wasman, supra at 567.

In Bordenkircher v. Hayes, 434 U.S. 357 (1978), no vindictiveness was found in a prosecutor carrying out a threat made in plea negotiations, provided the threat involved action legally available to the prosecutor. In the plea negotiation context, carrying out threats does not alone rise to a level of vindictiveness without additional proof of actual vindictiveness. Id., at 362, United States v. Goodwin, 457 U.S. at 380, n.12, Wasman, supra, at 568.

In United States v. Goodwin, the rule of Pearce, supra was not extended to a prosecutor filing a felony charge after a demand for a jury trial. The timing of the prosecutor's action, by itself, was not sufficient to establish a presumption of vindictiveness, but was sufficient to to raise the possibility.

The Court reconciled the various precedents from these cases in Wasman v. United States, supra.

> . . . [D]ue process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights. In Pearce and in Blackledge, the Court "presumed" that the increased sentence and charge were the products of actual vindictiveness aroused by the defendants' appeals. It held the defendants' right to due process was violated not because the sentence and charge were enhanced, but because there was no evidence introduced to rebut the presumption that actual vindictiveness was behind the increases; in other words, by operation of law, the increases were deemed motivated by vindictiveness. In Colten, Chaffin, Bordenkircher, and Goodwin, on the other hand -- where the presumption was held not to apply -- we made clear that a due process violation could be established only by proof of actual vindictiveness.
>
> In sum, where the presumption applies, the sentencing authority or the prosecutor must rebut the presumption that an increased sentence or charge resulted from vindictiveness; where the presumption does not apply, the defendant must affirmatively prove actual vindictiveness.

Wasman v. United States, 468 U.S. 559, 568-569 (Opinion by Burger, C.J.)

In Wasman, supra the Court was concerned with a claim of vindictive sentencing for a defendant who received a greater sentence on retrial. "This was sufficient to engage the presumption of Pearce." Id., at 569. The Court however, on the facts of Wasman, found no violation considering the careful record made by the sentencing judge explaining how circumstances changed between both sentencings.

Wasman, Id., found the specter of vindictiveness to arise in any case involving a court imposing an increased sentence on retrial, or the filing of additional charges against the defendant after invoking various rights. The specter dissipates if an independent justification for the enhancement can be shown. Once dissipated, a defendant can only succeed on a vindictiveness claim by proof of actual vindictiveness. If, on the other hand, the specter cannot be dispelled by independent justification, it solidifies into a finding of actual vindictiveness.

Wasman, supra is also significant in affirming of dismissal as an appropriate remedy for cases of vindictive prosecution.

> Because of its "severity," see Goodwin at 373, the Court has been chary about extending the Pearce presumption of vindictiveness when the likelihood of vindictiveness is not as pronounced as in Pearce and Blackledge. This reluctance is understandable for, as we have noted, operation of the presumption often "block[s] a legitimate response to criminal conduct." 457 U.S. at 373.

Wasman, supra, at 566.

The government cites numerous cases against this proposition. Each of these cases deals with a variety of prosecutorial misconduct other than vindictive prosecution. Vindictive prosecution implicates the the fundamental nature of the government's plenary prosecutorial power. There is a great potential for abuse of that power, and no greater abuse exists than retaliation for exercising constitutional rights. Other remedies may be appropriate in other situations. The prospect of dismissal is necessary as a remedy appropriate to the magnitude of harm. United States v. Morrison, 449 U.S. 361 (1981) There can be no tolerance of a prosecutor's attempt to deprive the citizenry of liberty for exercising constitutional rights.

The ruling in this case is wholly fact-bound. It responds to a situation unlikely to recur in the District of Columbia and which has never arisen in any other Circuit. Thus, the Petition for Writ of Certiorari should be denied.

In this case before the Court, the government argues that the Court of Appeals improperly found that the specter of vindictiveness was not dispelled by the government. Whether the specter is dispelled or not is ultimately a factual determination made by the trial court in the first instance. In this case, the trial court found the various considerations identified by the Court of Appeals all converge in the unique facts of this case to establish vindictiveness.

Throughout this case, the government has had every opportunity to present evidence to dispel the appearance of vindictiveness. The government failed to present such evidence. The government did not challenge the District Court's factual determinations supporting the finding of vindictiveness in the Court of Appeals, and is not challenging them now. Each case of vindictive prosecution rests on the particular circumstances of that case, as does the determination in this case. To ask this Court for salvage from a failed litigation strategy is not a sufficiently compelling reason for this Court to substitute its judgment for that of the lower court.

CONCLUSION

The petition for writ of certiorari should be denied. The Court may wish to consider summary affirmance.

Respectfully submitted.

Daniel Ellenbogen

Counsel for Respondents

December 1987

(3)

No. 87-730

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTINE MEYER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondents argue (Daily Opp. 7-11; Hand Opp. 8-10) that the court of appeals was correct in relying on a presumption of vindictiveness, because the facts of this case suggest that the prosecutor improperly brought the second charge against them.[1] Respondents would confine

[1] Respondents Coleman and Blake take a different tack. They argue (Coleman Opp. 8) that the court of appeals did not presume vindictiveness, but instead found that the government was in fact vindictive because the government failed to offer an independent justification for the enhancement. That assertion is wrong. The district court found that the government acted vindictively, but the court of appeals declined to reach that question. It expressly relied on a presumption that the government acted vindictively. Pet. App. 6a (emphasis added) ("The district court in this case held that the defendants had shown actual vindictiveness, *but we decline to reach this question*. * * * [W]e believe that the defendants presented evidence that would allow a court of appeals at least to find that *a presumption of vindictiveness applied*.").

to its facts this Court's decision in *United States* v. *Goodwin*, 457 U.S. 368 (1982), that a prosecutor's pretrial decision to file additional charges against a defendant is not presumptively unlawful. This Court's decision in *Goodwin*, however, did not reject the use of a presumption of vindictiveness on the ground that the prosecutor in that case did not appear to have been vindictive. Like the court of appeals, respondents have confused a presumption (*i.e.*, a legal rule applicable to a broad range of cases) with an inference (*i.e.*, a conclusion drawn from the facts of a particular case). To say that the presumption of vindictiveness is applicable except when the facts of a particular case show that the prosecutor was not acting vindictively is to say that there is a presumption of vindictiveness with respect to pretrial decisions to add charges, but that it is rebuttable in particular cases. And that is not what *Goodwin* said at all.

Moreover, the approach endorsed by respondents and the court of appeals would permit the courts to invoke a presumption of vindictiveness on the basis of facts that do not even support an inference of vindictiveness (*e.g.*, the prosecutor's decision to dismiss the second charge in order to avoid a jury trial).[2] That approach would permit the courts to find that the prosecutor's decision was vindictive in virtually every case involving multiple defendants, because the facts that the court of appeals found signifi-

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[2] Respondents concur (Coleman Opp. 5; Daily Opp. 16; Hand Opp. 1, 11) in Judge Silberman's conclusion (Pet. App. 35a) that the prosecutor's decision to dismiss the additional charge to avoid a jury trial was "unseemly prosecutorial maneuvering." Neither respondents nor Judge Silberman cite any authority to support the suggestion that such a decision is improper, and we know of none. In fact, *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), and the Court's other decisions involving plea bargaining expressly recognized that the prosecutor may *add* otherwise valid charges in order to persuade the defendant to forgo his right to a jury trial. See also *Goodwin*, 457 U.S. at 378-379 & n.10. It follows that a prosecutor's decision to *drop* charges to avoid a jury trial should be unassailable.

cant (*e.g.*, the fact that respondents faced a more severe sentence than the demonstrators who forfeited collateral) are often the natural consequences of plea bargaining. Finally, that approach permits the courts to engage in arbitrary decisionmaking, because neither the court of appeals nor respondents have offered a principled basis for distinguishing those cases in which a presumption of vindictiveness should apply from those in which a presumption should not be applied.

2. Respondents also maintain (Coleman Opp. 8; Daily Opp. 17-18; Hand Opp. 11, 14-16) that *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), is inapplicable to this case because no plea bargaining took place either before or after the prosecutor filed the second charge.[3] Respondents' argument, however, is premised on the assumption that "plea bargaining" requires the government and the defense to dicker over the terms of a plea agreement in the same way that a buyer and seller in the marketplace haggle over the price of merchandise.

Plea bargaining is the process by which the parties to a criminal prosecution agree on a disposition of the case short of a trial on the merits. Although the "bargaining" ordinarily will involve some form of negotiation between the prosecution and the defense, that is not necessarily true. For example, traffic (and similar) offenses are commonly resolved, simply and efficiently, by allowing the accused to forfeit bail according to a fee schedule set by the particular locality involved. That method of resolving a charge is as much a form of plea bargaining as the type of negotiations that occur in the case of more serious

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[3] Somewhat inconsistently, respondent Daily asserts (Opp. 3) that the prosecutor threatened respondents with incarceration if they refused to forfeit collateral. That assertion is wrong. At the hearing in district court, the prosecutor represented that no such threats had been made. 9/11/85 Tr. 21, *reprinted in* Daily Opp. App. 21a.

charges, such as felonies. The difference is simply that the negotiations between the parties have been eliminated by codifying the terms of the bargain in a rule of court that applies to every case involving a particular charge. That difference is immaterial, however. The lesson of *Bordenkircher* is that the prosecutor may increase the charges against a defendant in order to encourage him to plead guilty. It makes no difference whether the prosecutor's "deal" is conveyed to one defendant or to all, or whether it is devised for one case or for an entire category of cases. In each instance, the defendant is offered the option of disposing of the charge without a trial by bearing a lesser penalty of some sort.

Bordenkircher therefore governs this case. The citations issued to respondents and the other demonstrators stated that a person could forfeit $50 collateral and dispose of the original charge. *E.g.*, C.A. App. 3-39. The hearing notices sent to respondents reiterated that fact. *E.g.*, Letter from the Clerk to Mindy Washington (June 5, 1985), *reprinted in* Washington Opp. App. 12. And if there had been any doubt on that score, the prosecutor made it clear at the hearing in district court that the offer to forfeit the $50 collateral remained open until trial began. Pet. 4; 9/11/85 Tr. 21, 26, 30-31, 33, *reprinted in* Daily Opp. App. 21a, 26a, 30a-31a, 33a.[4] Neither *Bordenkircher* nor

[4] Respondent Daily asserts (Opp. 12 (footnote omitted)) that "once respondents had exercised their election for trial in the district court, the forfeiture of collateral option arguably expired by operation of law," because Local Rule 505(d) of the Rules of the United States District Court for the District of Columbia only authorizes a magistrate to accept payment of a suitable fee in lieu of a trial. That claim (which respondents are making for the first time) is wrong for two reasons. First, the local rule does not forbid a district court from accepting the forfeiture of collateral; it simply authorizes magistrates to do so. Second, if respondents were concerned that the district court could not accept their forfeiture of collateral, they could have asked the court to remand the case to the magistrate for that purpose. No respondent made that request.

any other decision of this Court requires anything more of the prosecution.

3. We explained in our petition (at 14) that the lower court's decision to dismiss the untainted charge against respondents is directly contrary to this Court's decision in *Blackledge* v. *Perry*, 417 U.S. 21, 31 n.8 (1974), where the Court held that a charge untainted by prosecutorial vindictiveness should not be dismissed. Respondents have made no attempt to reconcile the decision below with this Court's decision in *Blackledge*. Coleman Opp. 8; Hand Opp. 18-20; Meyer Opp. 16-20. That alone is sufficient to require the judgment below to be reversed.

We also explained in our petition (at 14-15) that the court of appeals' decision expressly conflicts with the Ninth Circuit's decision in *United States* v. *Hollywood Motor Car Co.*, 646 F.2d 384 (1981), rev'd on other grounds, 458 U.S. 263 (1982), and is inconsistent with the Sixth Circuit's en banc decision in *United States* v. *Andrews*, 633 F.2d 449 (1980), cert. denied, 450 U.S. 927 (1981). Respondent Hand argues (Opp. 19-20) that those decisions are distinguishable. In those cases, she claims, the district court was able to remedy the vindictive conduct by dismissing the tainted charge, whereas in this case that option was not available, since the government had already dismissed the tainted charge on its own motion. That distinction is immaterial. Neither the Ninth nor the Sixth Circuit would authorize a district court to dismiss an untainted charge. The Sixth Circuit endorsed this Court's decision in *Blackledge* v. *Perry, supra*, in discussing the appropriate remedy for prosecutorial vindictiveness (*Andrews*, 633 F.2d at 455, citing *Perry*), and the Ninth Circuit in *Hollywood Motor Car* rejected the precise rationale given by the District of Columbia Circuit in this case for dismissing the untainted charge (*Hollywood Motor Car*, 646 F.2d at 388-389). The distinction that respondent Hand proposes makes sense only on the assumption that

a district court must be able to punish the government in some way for engaging in misconduct even if the defendant is not prejudiced by the misconduct. This Court rejected that argument in *United States* v. *Morrison*, 449 U.S. 361 (1981), however, and respondents have offered no persuasive reason why a different rule should be applied here.

4. Respondent Coleman erroneously contends (Opp. 12) that "[t]he ruling in this case is wholly fact-bound" and "responds to a situation unlikely to recur in the District of Columbia" or elsewhere. In fact, the Court has pending before it a petition seeking review of a decision of the District of Columbia Court of Appeals stemming from a different demonstration, in which that court rejected a claim of prosecutorial vindictiveness arising from similar facts. *Shiel* v. *United States*, 515 A.2d 405 (D.C. 1986), petition for cert. pending, No. 87-6017.[5] Nor is *Shiel* the only other case in which this sequence of events is likely to occur. Mass demonstrations are a commonplace occurrence in the District of Columbia. Because a prosecutor may decide to bring an additional charge against demonstrators who choose to stand trial in any such case, the facts giving rise to respondents' claim of vindictiveness are likely to recur with regularity.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

JANUARY 1988

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[5] We have provided respondents with a copy of our response to the petition in the *Shiel* case.

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